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No. ____

IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

STATE OF SOUTH CAROLINA; DAVID M. BEASLEY, Governor of the State of South Carolina; DOUGLAS E. BRYANT, Commissioner of the South Carolina Department of Health and Environmental Control; SOUTH CAROLINA DEPARTMENT OF HEALTH AND ENVIRONMENTAL CONTROL; SOUTH CAROLINA BOARD OF HEALTH AND ENVIRONMENTAL CONTROL,
Petitioners,

v.

ENVIRONMENTAL TECHNOLOGY COUNCIL,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

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January 10, 1997

QUESTIONS PRESENTED

1. Whether Congress has displaced dormant Commerce Clause precepts with respect to state hazardous waste programs that are approved by the Environmental Protection Agency under the Resource Conservation and Recovery Act upon satisfaction of a "consistency" test that includes criteria for evaluating effects on interstate commerce, which state programs operate "in lieu" of federal law.

2. Whether South Carolina's neutral cap on disposal of hazardous waste by burial and requirement that the need for a new treatment facility be demonstrated by reference to wastes generated in-state should be sustained, whatever criteria for adjudging effects on interstate commerce are applied.

3. Whether a court, uncertain as to the meaning or application of a federal agency's statutory authority and implementing regulations, should refer issues of their interpretation to the agency under the doctrine of primary jurisdiction.

4. Whether the court of appeals erred in employing an abuse-of-discretion standard rather than a *de novo* standard for review of the district court's denial on legal grounds of a motion for referral under the primary jurisdiction doctrine.

PARTIES TO THE PROCEEDING

The Sierra Club, Energy Research Foundation, Citizens for Clean Air and Water, Environmentalists, Inc., and Citizens Asking for a Safe Environment (CASE) intervened as defendants in this case in the district court. These intervening defendants were also appellants in the court of appeals.

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The State of South Carolina, David M. Beasley, Governor of the State of South Carolina, Douglas E. Bryant, Commissioner of the South Carolina Department of Health and Environmental Control, the South Carolina Department of Health and Environmental Control, and the South Carolina Board of Health and Environmental Control ("South Carolina" or "the State"), respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals is reported at 98 F.3d 774. *App.* 1a. The opinion of the district court is reported at 901 F. Supp. 1026. *App.* 28a.

JURISDICTION

The judgment of the court of appeals was entered on October 15, 1996. The jurisdiction of this Court is invoked under 28 U.S.C § 1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

U.S. Const. art. I, § 8, cl. 3, provides that "The Congress shall have Power . . . To regulate Commerce . . . among the several States."

Section 3006 of the Resource Conservation and Recovery Act, as amended, 42 U.S.C. § 6926 (1995), is set out in the Appendix at 105a-107a. Paragraph 104(c)(9) of the Comprehensive Environmental Response, Compensation, and Liability Act, as amended, 42 U.S.C. § 9604 (c)(9) (1995), is set out in the Appendix at 108a. The Environmental Protection Agency's "consistency" regulation, 40 C.F.R. § 271.4 (1995), is set out in the Appendix at 109a.

South Carolina Acts No. 196 of 1989 and No. 590 of 1990, Executive Orders Nos. 89-17 and 89-25, and Department of Health and Environmental Control Regulation 61-99 are set out in the Appendix at 125a-147a.

STATEMENT

Exercising its power under the Commerce Clause, U.S. Const. art. I, § 8, cl. 3, Congress enacted the Resource Conservation and Recovery Act of 1976, as amended ("RCRA"), 42 U.S.C. §§ 6901-6992k (1995), and the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended ("CERCLA"),

42 U.S.C. §§ 9601-9675 (1995), to address treatment, storage, and disposal of hazardous wastes and remediation of contamination from hazardous substances and constituents, respectively. Both RCRA and CERCLA contemplate that States will establish counterpart regulatory programs. RCRA explicitly provides that State programs for regulating hazardous wastes, if "consistent" with the Federal and other State programs, shall, upon approval by the Environmental Protection Agency ("EPA"), operate "in lieu" of the Federal program. RCRA § 3006, 42 U.S.C. § 6926(b).

The court of appeals' decision in this case invalidated on dormant Commerce Clause grounds a set of laws and rules that are part of South Carolina's hazardous waste regulatory program. The court of appeals struck down these laws and rules notwithstanding the fact that South Carolina's program has been approved by EPA and thus has been found to satisfy the statutory standard of consistency established by Congress in RCRA and defined and implemented by EPA. Despite this Court's precedents to the contrary, the court of appeals concluded that a federal agency's implementing regulations and its actions under those regulations are not to be considered in deciding whether a federal statute has displaced the dormant Commerce Clause. The court's application of dormant Commerce Clause analysis to South Carolina's program, even though it was approved by EPA under the RCRA standard, contravenes Congress' mandate that interstate issues respecting hazardous waste regulatory programs be addressed through RCRA, by EPA. In effect, the court of appeals held that state laws which are approved by a federal agency under a federal statute can nonetheless be struck down by the courts under the dormant Commerce Clause, an unprecedented and impermissible result.

Moreover, the court of appeals struck down two provisions, a neutral cap on total amounts to be landfilled and a "needs" regulation, that match ones that have been expressly approved by this Court as permissible under

the dormant Commerce Clause. Whatever standard is applied for evaluating effects on interstate commerce, whether derived from federal statute or dormant Commerce Clause jurisprudence, the court's conclusion on these provisions is improper and should be set aside.

The federal regulatory regime.

RCRA is a comprehensive federal statute governing identification, listing, treatment, storage, transportation, and disposal of hazardous wastes. In enacting RCRA, Congress provided that States might develop their own programs to regulate such wastes. RCRA § 3006, 42 U.S.C. § 6926(b). RCRA subjects such programs to a standard of "consistency": to be approved by EPA, each State's RCRA program must be "consistent with the Federal or State programs applicable in other States." *Id.* State programs that are approved by EPA under this consistency requirement operate "in lieu of the Federal program." *Id.* Thus, an approved state program operates in place of and with the force of federal law. RCRA § 3006, 42 U.S.C. § 6926(d).

EPA is responsible for implementing RCRA's statutory mandates. EPA's regulations for authorization of state programs, set out in 40 C.F.R. Part 271, specify "the procedures EPA will follow in approving, revising, and withdrawing approval of State programs and the requirements State programs must meet to be approved by the Administrator under sections 3006(b), (f) and (h) of RCRA." 40 C.F.R. § 271.1(a). In accord with RCRA § 3006, EPA's regulations provide that the Agency must authorize a state program unless it is found inconsistent with either the federal program outlined in RCRA or the programs already approved in other States. 40 C.F.R. §§ 271.1(e), 271.4.

Subsection (a) of the "consistency" provisions in 40 C.F.R. § 271.4 prescribes a "reasonableness" test for judging effects of a State's program on movement of

hazardous waste in interstate commerce. *App.* 109a. Specifically, "[a]ny aspect of the State program which unreasonably restricts, impedes, or operates as a ban on the free movement across the State border of hazardous wastes from or to other States . . . shall be deemed inconsistent" and thus not in compliance with RCRA § 3006. 40 C.F.R. § 271.4(a). EPA adopted this "reasonableness" test under RCRA after giving explicit consideration to statutory "consistency" requirements, *see* 45 *Fed. Reg.* 33,290, 33,395 (May 19, 1980), and taking account of precedents interpreting the "dormant" Commerce Clause. *Id.*

Congress has also addressed interstate waste disposal issues under the ambit of CERCLA. In 1986, Congress added paragraph 104(c)(9) to CERCLA to address the reluctance of some States and localities to permit construction of new hazardous waste treatment and disposal facilities. Paragraph 104(c)(9) requires each State to "assure the availability of hazardous waste treatment or disposal facilities" for all hazardous wastes generated *within* such State over the coming twenty years. CERCLA § 104(c)(9), 42 U.S.C. § 9604(c)(9). The facilities may be either "within the State or outside the State in accordance with an interstate agreement or regional agreement or authority." *Id.*

EPA coordinated the implementation of this capacity-assurance provision of CERCLA with EPA's regulatory regime under RCRA. Particularly, EPA decided to use the process by which Capacity Assurance Plans are developed, evaluated, and approved as the primary means of addressing "State actions which may be inconsistent with the federal Resource Conservation and Recovery Act program." Policy Mem. (Dec. 23, 1988), *App.* 123a. As a result, the RCRA state-authorization withdrawal process is to be used secondarily only "after determining that the CERCLA process has proven ineffective." *Id.*

South Carolina's corresponding regulatory program.

In 1985, EPA granted South Carolina authorization under RCRA § 3006 to operate its own hazardous waste program in lieu of the federal program.[1] *See* 50 *Fed. Reg.* 46,347 (November 8, 1985), *App.* 110a. In doing so, EPA explained its use of the "consistency" regulation. *Id.* at 46,438-440, *App.* 116a-122a. EPA noted that although Section 271.4(a) had some roots in dormant Commerce Clause standards, *e.g., City of Philadelphia v. New Jersey*, 437 U.S. 617 (1978), the "Agency is not required to adopt the Constitutional test for impediments or restrictions in interpreting its own regulations, and declines to do so here." 50 *Fed. Reg.* at 46,439, *App.* 117a. EPA disagreed "that *any* disparity in treatment between in-State and out-of-State wastes is *per se* unreasonable." *Id.* (emphasis in original). Instead, EPA determined that RCRA requires "all relevant factors" to be considered in assessing the permissibility of state hazardous waste laws with interstate effects. *Id.*

With the advent, in 1986, of the federal capacity-assurance requirements under CERCLA, South Carolina made adjustments to its then-recently-approved program. South Carolina was and still is one of the few States which have large existing hazardous waste treatment and disposal facilities. Consequently, South Carolina has borne the brunt of the failure of other States to provide adequate, or in some cases, any, commercial treatment and disposal ca-

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[1] EPA's application of the consistency requirements in Section 271.4 to South Carolina's RCRA program required resolution of a challenge by the Hazardous Waste Treatment Council, respondent in this case (which has since changed its name), to the moderately higher fee South Carolina sought to impose on disposal of out-of-state waste. At issue was whether the disparate fee schedule was unconstitutional and whether it complied with Section 271.4(a). EPA determined that the different fee schedule was not unreasonable, and South Carolina's hazardous waste program including the fee schedule was approved on November 8, 1985. 50 *Fed. Reg.* at 46,438-440, *App.* 116a-122a.

pacity for hazardous wastes. In developing its Capacity Assurance Plan, South Carolina had to provide for its own wastes, allocate capacity for out-of-state wastes that the State accepted under an interstate or regional agreement,[2] and assure that the existing permitted capacity was not exhausted by demands from States that did not provide disposal capacity for their wastes or enter into appropriate agreements. To deal with these issues, South Carolina revised its EPA-approved hazardous waste regulatory program in three respects pertinent to this litigation.

The first adjustment was made in Act No. 196 of 1989. *App.* 125a. Section 9 of that Act prohibited the treatment, storage, or disposal in South Carolina of hazardous waste generated in a State that both (1) prohibited the treatment, storage, or disposal of such waste, and (2) "ha[d] not entered into an interstate or regional agreement for the safe" treatment, storage, or disposal in another State. Act No. 196, § 9, amending S.C. Code Ann. § 44-56-130, *App.* 127a.[3] There was no requirement that the regional agreement be one to which South Carolina was a signatory. *Id.*[4]

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[2] In October 1989, South Carolina joined the States of Alabama, Kentucky, and Tennessee in a SARA Capacity Assurance Regional Agreement. In November of 1989, the State of North Carolina was added to that Regional Agreement, but North Carolina did not fulfill its commitments under the Agreement and it was automatically removed from the Agreement as a consequence. In the Regional Agreement, the Party States committed to provide specific facilities that the States needed to make up deficits in treatment and disposal capacity for particular types of waste.

[3] Section 5 of Act No. 196 expressed a nondiscriminatory, precatory "preference" for the disposal of in-state waste at facilities within the State. *Id.* § 5, adding S.C. Code Ann. § 44-56-205.

[4] Act No. 196 superseded and partially codified Executive Order No. 89-17, which provided that permitted disposal facilities in the State were not to accept hazardous wastes generated in another State where the waste was banned or prohibited from disposal in that State by law or regulation, *and* where South Carolina had no interstate or regional agreement with such State. Executive Order

The second adjustment was made to South Carolina's neutral cap on land disposal of hazardous waste. At the time, South Carolina had authorized disposal of up to 135,000 tons of hazardous waste per year at commercial land-disposal facilities in the State. S.C. Code Ann. § 44-56-60(a). In accord with RCRA's mandate to reduce landfill disposal whenever possible, *see* 42 U.S.C. §§ 6901(b)(7)-(8), 6924, the State legislature enacted Act No. 590 of 1990 to provide for a phased decrease in the amount of hazardous waste disposed of in landfills. *App.* 129a. The existing statutory authorization of 135,000 tons was reduced to 120,000 tons effective July 1, 1990, and to 110,000 tons effective July 1, 1991. *App.* 131a. In addition, each disposal facility was to reserve at least the same capacity used during the previous year for disposal of hazardous waste generated in-state.[5]

Third, Department of Health and Environmental Control ("DHEC") Regulation 61-99 became effective January 12, 1990. *App.* 134a. This rule, commonly called the "needs regulation," requires that an applicant seeking a permit to expand an existing treatment facility or to build a new facility shall demonstrate a need for the increased capacity. For purposes of demonstrating the defined amount of "need," out-of-state hazardous waste is not included in the applicant's calculations. DHEC Reg. 61-99, § III(C), *App.* 136a.

No. 89-17 also established a preference for disposal of waste generated within South Carolina.

[5] Act No. 590 also provided that the amount of waste disposed of in the State could exceed the specified limit if the South Carolina Department of Health and Environmental Control ("DHEC") determined that (1) an increase in disposal of waste from a particular in-state site was "necessary to protect the health and safety" of the South Carolina citizenry, or (2) at least 110,000 tons of in-state waste was disposed of by land in the State during the previous year. This Act superseded Executive Order No. 89-25.

South Carolina's Capacity Assurance Plan was timely submitted to EPA on October 17, 1989. Each of the legislative, executive, and regulatory actions at issue here was included in the Plan or was projected for inclusion.[6] The SARA Capacity Assurance Regional Agreement to which South Carolina was a party, *see supra*, p. 7 n.2, was also included as part of South Carolina's Plan.

After preliminarily reviewing South Carolina's Capacity Assurance Plan, EPA requested that South Carolina address whether the limitations of Executive Order No. 89-17 and Act No. 196 satisfied the RCRA "consistency" requirement. Letter from Greer C. Tidwell, EPA Regional Administrator for Region IV, to Michael D. Jarrett, Director of South Carolina Department of Health and Environmental Control (July 6, 1989). South Carolina responded with a formal Opinion of its Attorney General that the provisions were consistent with federal law and did not violate the Commerce Clause. Opinion by T. Travis Medlock, Attorney General (August 23, 1989). EPA thereafter approved the Plan and commended the State for its efforts. Letter from Greer C. Tidwell, EPA Regional Administrator for Region IV, to the Hon. Carroll A. Campbell, Jr., Governor of South Carolina (May 10, 1990).

Thereafter, in 1995, EPA issued a notice that it had made a final decision approving South Carolina's hazardous waste regulatory program under RCRA in all respects. 60 *Fed. Reg.* 42,046 (Aug. 15, 1995).

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[6] Executive Orders Nos. 89-17 and 89-25 and Act No. 196 were included in the submission. Regulation 61-99 was then a proposed permanent regulation. In the submission South Carolina advised EPA that legislation was expected to be passed which would enact into law quantitative disposal limits reflecting the amounts specified in Executive Order No. 89-25. This was effectuated in Act No. 590.

This litigation.

On June 27, 1990, respondent Environmental Technology Council ("ETC"), then named the Hazardous Waste Treatment Council, filed suit against South Carolina in federal district court, seeking declaratory and injunctive relief primarily based upon claims that Act No. 196 of 1989, Act No. 590 of 1990, and DHEC Reg. 61-99 violated the Commerce Clause, U.S. Const. art I, § 8, cl. 3.[7] On January 11, 1991, by a Preliminary Injunction and Order, the district court "declar[ed] invalid" and enjoined enforcement of the South Carolina laws, executive orders, and regulations that had been put at issue. *Hazardous Waste Treatment Council v. South Carolina,* 766 F. Supp. 431 (D.S.C. 1991), *App.* 80a. Appeal was taken to the United States Court of Appeals for the Fourth Circuit, which, assessing ETC's claims under the preliminary injunction standard of *Blackwelder Furniture Co. v. Seilig Mfg. Co.,* 550 F.2d 189 (4th Cir. 1977), held that the "likelihood of irreparable harm to the plaintiff" would be "measurably greater" if the injunction were denied. *Hazardous Waste Treatment Council v. South Carolina,* 945 F.2d 781, 795 (4th Cir. 1991) (*"HWTC"*), *App.* 50a, 78a. The court of appeals thus affirmed entry of the preliminary injunction, while remanding to the district court with instructions for modification to strike the words implying a declaration of invalidity and to narrow the preliminary injunction in specified respects. *See id.* at 787 n.9, 795, *App.* 63a, 78a.

The court of appeals' opinion in *HWTC* was rendered on September 20, 1991, and the mandate issued on October 21, 1991. On November 21, 1991, South Carolina filed a motion requesting the district court to conform its preliminary injunction to the court of appeals' mandate. Shortly thereafter, in light of the uncertainties expressed

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[7] Jurisdiction of Hazardous Waste Treatment Council's complaint was predicated upon 28 U.S.C. § 1331.

by the court of appeals regarding the proper application of the consistency provisions of RCRA § 3006 and 40 C.F.R. § 271.4,[8] South Carolina moved for a stay of the proceedings and referral of such questions to EPA's primary jurisdiction. ETC contested this motion and on February 3, 1992 moved for summary judgment on its Commerce Clause claims. The district court heard argument on ETC's motion for summary judgment on April 30, 1992.[9]

Nearly three years later, on April 13, 1995, the district court entered its Findings of Fact, Conclusions of Law, and Order (1) denying South Carolina's motion to refer the RCRA-consistency issue to EPA's primary jurisdiction, (2) granting ETC's motion for summary judgment on its Commerce Clause claims and entering a permanent injunction against the challenged provisions, and (3) denying as moot South Carolina's motion to conform the preliminary injunction to the court of appeals' 1991 mandate. *App.* 49a. South Carolina filed a timely appeal.

On October 15, 1996, the court of appeals issued an opinion affirming the district court's summary judgment. In holding that the dormant Commerce Clause provided the standard applicable to this case, the court said there was an "absence of a clear Congressional statement authorizing discrimination," *Environmental Technology Council*

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[8] In its 1991 decision, the court of appeals reviewed RCRA § 3006 and EPA's implementing regulation and explicitly noted its uncertainty:

> We are still unsure, however, of whether EPA was attempting to state (1) that some disparities [in treatment of in-state and some out-of-state wastes] might be constitutional, (2) that even if the disparities would be unconstitutional, EPA could approve the programs as "consistent," or (3) that EPA had the authority to permit otherwise unconstitutional state actions.

945 F.2d at 794, *App.* 76a.

[9] Subsequent hearings were held on August 5 and September 20, 1994.

v. Sierra Club, 98 F.3d 774, 783 (4th Cir. 1996), *App.* 15a. The court of appeals accorded no weight to EPA's implementing regulations in this regard, holding that "[e]ven if EPA had expressly approved the laws in question, we could not do so without express congressional authorization." *Id.* at n.17, *App.* 17a. The court of appeals addressed the neutral cap and the needs regulation along with the other aspects of the challenged laws for purposes of its analysis, notwithstanding the circumstance that these two provisions set overall limits on disposal capacity not dependent on the origin or source of the waste. Broadly characterizing the neutral cap and needs regulation as part of a program that "favors in-state interests over out-of-state interests," the court of appeals struck down the "overall limit[s]" as "discriminatory." 98 F.3d at 788, *App.* 24a. Finally, reviewing for abuse of discretion the district court's decision not to refer this case to EPA's primary jurisdiction, the court of appeals characterized the question to be referred as "whether South Carolina's laws are constitutional," and concluded that "[t]he EPA's special expertise is not needed to decide a question of law in a constitutional matter." *Id.* at 789, *App.* 27a.

REASONS FOR GRANTING THE PETITION

This case raises important questions regarding whether dormant Commerce Clause criteria are supplanted by a comprehensive federal regulatory regime that authorizes approved state programs to operate for federal as well as state purposes. The court of appeals struck down on Commerce Clause grounds South Carolina laws and rules that were approved by EPA under a federal regulatory regime that includes a review for effects on interstate commerce as part of the statutory approval process. Because EPA's approval of South Carolina's laws and rules meant that South Carolina's program operated "in lieu" of federal law, 42 U.S.C. § 6926(b), the court of appeals

in effect used the dormant Commerce Clause to invalidate federal law.

This case thus squarely presents the important question, identified but pretermitted (because not raised below) in *Chemical Waste Management v. Hunt*, 504 U.S. 334, 346 n.9 (1992), of whether the RCRA consistency standard and federal approval under that standard displace the dormant Commerce Clause. In resolving that issue in this case, the court of appeals refused to give effect to a series of precedents of this Court holding that an administrative agency's construction of a federal statute, and of its own regulations implementing that statute, has a direct bearing on whether dormant Commerce Clause criteria are in fact supplanted. *E.g., Northeast Bancorp, Inc. v. Board of Governors of the Fed. Reserve Sys.*, 472 U.S. 159 (1985); *White v. Massachusetts Council of Constr. Employers, Inc.*, 460 U.S. 204 (1983); *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130 (1982). Apart from RCRA, the decision in this case is significant for a number of other federal-state regulatory programs that follow the pattern exemplified by RCRA. In refusing to give weight to the approval of a federal agency—and to the criteria adopted by the agency—the court of appeals' decision in this case calls into question the validity of EPA-approved hazardous waste regulatory programs in operation in a number of States, and, more generally, undermines a basic federal-state regulatory model employed by Congress.[10]

In addition, contrary to this Court's guidance in *Chemical Waste Management*, the court of appeals refused to

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[10] In the area of *solid* waste regulation, which unlike hazardous waste regulation Congress has largely left to states and localities, challenges to state and local laws under the dormant Commerce Clause have been frequent. *See C&A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383 (1994); *Oregon Waste Systems, Inc. v. Department of Envtl. Quality*, 511 U.S. 93 (1994); *Fort Gratiot Sanitary Landfill, Inc. v. Michigan Dep't of Natural Resources*, 504 U.S. 353 (1992).

uphold two provisions, the neutral cap and the needs regulation, which place "an evenhanded cap on the total tonnage landfilled" in the State. 504 U.S. at 345. Under either the RCRA consistency standard or a dormant Commerce Clause standard, the court of appeals erred in striking down provisions which regulated overall waste disposal through neutral means.

Finally, the court of appeals wrongly approved the district court's refusal to refer questions of the interpretation and application of the RCRA "consistency" standard and EPA's "reasonableness" regulations to the Agency under the primary jurisdiction doctrine. 98 F.3d at 789, *App.* 27a. The court did so despite its observations that "EPA's position on what constitutes 'reasonableness' has changed over time," *id.* at 783, *App.* 14a, and "EPA has taken seemingly contradicting positions at different times on how it will apply and interpret the consistency requirement." *Id.* at 783 n.14, *App.* 14a. The court of appeals achieved this result notwithstanding the open questions of statutory and regulatory interpretation and application by simply assuming that those questions did not matter because a constitutional question of law was at issue. *Id.* at 789, *App.* 27a. This approach to the primary jurisdiction doctrine in a Commerce Clause case is wrong. A dormant Commerce Clause question arises at all only if the pertinent federal statutes do not sanction the State's law at issue. EPA is charged by statute with implementing the laws that are at issue in that regard in this case. As to the primary jurisdiction doctrine, the court of appeals' decision is contrary to *Ricci v. Chicago Mercantile Exchange*, 409 U.S. 289 (1973) (ruling that reference should be made to Commodity Exchange Commission of questions concerning rules adopted under Commodity Exchange Act, where underlying claims were brought under antitrust laws), and to *dicta* in *Northwest Airlines, Inc. v. County of Kent*, 510 U.S. 355, 366 n.10 (1994), and is in conflict with *Massachusetts v. Black-*

stone Valley Elec. Co., 67 F.3d 981 (1st Cir. 1995) (vacating partial summary judgment entered by district court and ordering referral to EPA of "legal" question whether ferric ferrocyanide is a "cyanide" within the meaning of EPA regulations).

A. Congress' Exercised Commerce Power

The Constitution's grant to Congress of the power to regulate commerce among the several States prohibits by implication State actions that burden interstate commerce, at least where the matters have not been addressed by a federal statute. *See South-Central Timber Dev., Inc. v. Wunnicke*, 467 U.S. 82, 87 (1984); *Hughes v. Oklahoma*, 441 U.S. 322, 325 (1979); *Cooley v. Board of Wardens*, 53 U.S. (12 How.) 143 (1852). The dormant Commerce Clause, however, is but "a limitation on the power of the States," *South-Central Timber*, 467 U.S. at 87, and, by exercising its power under the Commerce Clause, Congress may "permit the states to regulate . . . commerce in a manner which would otherwise not be permissible," *Southern Pacific Co. v. Arizona*, 325 U.S. 761, 769 (1945). *See Northeast Bancorp, Inc. v. Board of Governors of the Fed. Reserve Sys.*, 472 U.S. 159, 174 (1985); *White v. Massachusetts Council of Constr. Employers, Inc.*, 460 U.S. 204 (1983); *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130 (1982). To be effective, such authorization must be "unmistakably clear" from the plain meaning of the statute or regulations involved, or from independent evidence of congressional intent. *South-Central Timber*, 467 U.S. at 91. Where federal law "unmistakably" creates a standard different from those of the dormant Commerce Clause, the dormant Commerce Clause no longer applies, and the challenged state laws are tested by the requirements of the pertinent federal statute or regulation.

1. *RCRA.*

As a result of the enactment of RCRA and amendments to CERCLA, "the commerce power of Congress is not dormant, but has been exercised by that body," *Northeast Bancorp,* 472 U.S. at 174, and the dormant Commerce Clause standards have been displaced by statutory ones. In RCRA, Congress established a comprehensive scheme for the regulation of hazardous wastes, and provided that States may operate their own programs in place of the federal program if the state program meets the statutory standard of consistency. In addition to specifying the standard by which state programs are to be measured, Congress provided procedures for federal review, by EPA, of proffered state programs.

Implementing RCRA's mandate, EPA adopted regulations to flesh out the federal approval process, and in doing so, expressly considered the effects that state regulation might have on interstate commerce. EPA interpreted and applied the RCRA consistency standard as creating a federal standard distinct from those of the dormant Commerce Clause. In its regulations, EPA prescribed a multi-factored "reasonableness" test by which state programs are to be measured for consistency and expressly rejected any notion that the dormant Commerce Clause would supply the standard of reasonableness.

By creating a statutory standard of consistency and by providing that state programs deemed "consistent with the Federal or State programs applicable in other States" shall be approved and operate "in lieu of" federal law, RCRA § 3006, 42 U.S.C. § 6926(b), Congress has expressed its intention to exercise its Commerce Clause power and to create a statutory standard for adjudging state programs. Congress has manifestly not left the nation's policy respecting interstate movement in hazardous wastes to be addressed under a "dormant" standard. The legislative history of RCRA is explicit that Congress was well aware that hazardous waste management in-

volved the potential for interstate conflicts and that it intended for such issues to be addressed under the RCRA statutory scheme. The House Report of the bill that became RCRA noted that:

> [t]he fact that waste itself is in interstate and intermunicipal commerce has raised a number of problems. (Generally, hazardous waste is more likely to be the subject of interstate transportation than is nonhazardous industrial or municipal waste.) Several jurisdictions, including some states, have attempted to prohibit the importation of waste.

H.R. Rep. No. 1491, 94th Cong., 2d Sess. 10 (1976). Congress intended the consistency requirement under Section 3006(b) to address disparities in state programs and the consequent effects on interstate commerce:

> The general purpose of having federal minimum standards for hazardous waste disposal, with the option of state implementation of state programs equivalent to the federal program, is (1) it provides uniformity among the states as to how hazardous wastes are regulated, (2) it provides industry and commercial establishments that generate such wastes uniformity among states, (3) by providing such uniformity a state with environmentally sound laws does not drive business out of the state to a state which, for economic reasons, decides to be a dumping ground for hazardous wastes . . . .

Id. at 30. In exercising its Commerce Power to create a statutory standard of consistency, Congress displaced the "dormant" Commerce Clause.

In this vein, Congress empowered EPA to develop and implement regulations for RCRA that would ensure consistency with the federal program and among state laws. Using that authority, EPA has implemented the statutory consistency requirement by adopting 40 C.F.R. § 271.4. Under RCRA as applied by EPA, only an aspect of a state program which "*unreasonably* restricts, impedes,

or operates as a ban" on interstate movement of hazardous waste "shall be deemed inconsistent" and thus not permitted by federal law. 40 C.F.R. § 271.4(a) (emphasis added). In implementing this regulation, EPA rejected the suggestion that "RCRA section 3006(b) or any other section of RCRA requires the Agency to adopt the [dormant Commerce Clause] Constitutional test as the test for consistency or unreasonable restrictions or impediments." 50 *Fed. Reg.* at 46,439, *App.* 118a. Indeed, EPA requires that "all relevant factors"—not just the existence of burdens—be considered in assessing the permissibility of state laws with interstate effects. *Id.*[11] The RCRA consistency standard, as implemented by EPA, thus displaces the dormant Commerce Clause with respect to approved state programs for hazardous waste disposal. *South-Central Timber,* 467 U.S. at 91.

2. *CERCLA.*

The governing nature of RCRA's consistency provisions regarding interstate effects is specifically reinforced by capacity assurance requirements adopted by Congress as amendments to CERCLA in 1986. As noted *supra,* p. 5, CERCLA § 104(c)(9) requires States to provide assurances "deemed adequate by the President" of the "availability of hazardous waste treatment or disposal facilities" sufficient for the State's requirements over the next twenty years. The facilities must be "within the State or outside the State in accordance with an interstate agreement or regional agreement or authority." 42 U.S.C. § 104(c)(9)(B).

The "unmistakably clear" import of this requirement is that States such as South Carolina may—in fact, must—

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[11] EPA recognized that state requirements "may have some adverse effect on interstate commerce." 50 *Fed. Reg.* at 46,439, *App.* 118a. Construing the mandates of RCRA §§ 3006 and 3009, EPA concluded that not every "disparity in treatment between in-State and out-of-State wastes is *per se* unreasonable" or unlawful. *Id.*

"interfere" with interstate commerce in hazardous waste disposal capacity. For a State meaningfully to assure EPA that disposal capacity will be available for *its* wastes, it can and must address the existence and use of such facilities within the ambit of regional agreements.

The legislative history of paragraph 104(c)(9) demonstrates Congress' intent to authorize States to interfere with interstate commerce as necessary to comply with the new provision. Congress expressly approved "[u]se of *binding agreements* through interstate compacts *guaranteeing access* to a facility" as "one example of how a State may provide the requisite assurances." S. Rep. No. 11, 99th Cong., 1st Sess. 22 (1985) (emphasis added). If a State were to be forbidden under the dormant Commerce Clause from putting limits on access to its facilities by another State, it could not enter into such binding agreements. It could not *guarantee* access for waste from States party to regional agreements without being able to restrict access for waste from others. As Congress recognized, such restrictions will inescapably burden interstate commerce. Accordingly, in marked contrast to cases such as *C&A Carbone, supra,* Congress' direction that States enter into agreements which will guarantee access to appropriate facilities plainly constitutes a finding that "the unobstructed flow of interstate commerce itself is unable to solve the local problem," 511 U.S. at 393, involved in siting of hazardous waste facilities.

3. *The effect of EPA's regulations.*

Its attention gripped by the "Constitutional" nature of the issues in this case, the court of appeals gave short shrift to the interstate-effects aspects of the RCRA "consistency" standard. In this regard, the court of appeals refused to credit EPA's contrary conclusion—adopted as law in Section 271.4—that RCRA *does* create a distinct standard of "reasonableness" which is more permissive

than the dormant Commerce Clause.[12] It acknowledged the conflicting "reasonableness" standard, but "reject[ed] . . . South Carolina's argument that EPA's reasonableness standard should displace a constitutional dormant Commerce Clause analysis." 98 F.3d at 783, *App.* 14a. The court of appeals opined that, "[e]ven if EPA had expressly approved the laws in question, we could not do so without express congressional authorization." *Id.* at 784 n.17, *App.* 17a. This view of the Agency's role in the federal system is plainly at odds with the particular statute at issue and with this Court's jurisprudence.

For example, in *Merrion v. Jicarilla Apache Tribe, supra,* this Court rejected a dormant Commerce Clause challenge brought by oil and gas producers against a severance tax imposed by the Jicarilla Apache Tribe on oil and gas extracted from tribal lands. This Court held that because the tax had "received the requisite approval from the Secretary [of the Interior]" acting pursuant to his regulatory authority, the tax was insulated from dormant Commerce Clause review. 455 U.S. at 155. The Court based that holding on the federal approvals required by the Indian Reorganization Act, 25 U.S.C. §§ 476, 477. The cited provisions did not specifically mention taxing authority; rather, they provided broadly that changes in an Indian Tribe's constitution (which had been necessary to authorize the severance tax) had to receive federal approval. *Merrion* thus relied not on any evidence of Congressional intent respecting the burdens of the tax on interstate commerce, but on the fact that the tax had received a federal sanction by an agency. "Congress ha[d] affirmatively acted by providing a series of federal checkpoints that must be cleared before a tribal tax can

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[12] The court of appeals therefore also did not consider that the CERCLA capacity assurance process would be a factor in applying the "reasonableness" criterion.

take effect," and thus the federal commerce power had been exercised. 455 U.S. at 155.[13]

This Court looked to a federal agency's implementing regulations to displace the dormant Commerce Clause in *White v. Massachusetts Council of Constr. Employers, supra.* *White* involved a dormant Commerce Clause challenge to an executive order by the City of Boston requiring all construction projects receiving federal funds administered by the City to be "performed by a work force consisting of at least half bona fide residents of Boston." 460 U.S. at 206. The discriminatory spending of federal funds in favor of city residents was upheld on the rationale that "the order was affirmatively sanctioned by the pertinent *regulations*" governing use of the federal funds at issue. *Id.* at 215 (emphasis added). The applicable federal statutes did not specifically address local favoritism; the Court noted only a general goal of assisting "the poor, minorities, and unemployed." *Id.* at 213. Effective federal authorization was found, however, in the Department of Housing and Urban Development's implementing regulations, which permitted "the type of parochial favoritism expressed in the order." *Id.*

White reinforces the conclusions drawn in *Merrion*: in determining whether a statute displaces dormant Commerce Clause restrictions, the regulations and interpretive guidance of an agency charged with administering that

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[13] The Court explained that as a result of its approval by the Secretary—

> this tribal tax comes to us in a posture significantly different from a challenged state tax, which does not need specific federal approval to take effect, and which therefore requires, in the absence of congressional ratification, judicial review to ensure that it does not unduly burden or discriminate against interstate commerce. Judicial review of the Indian tax measure, in contrast, would duplicate the administrative review called for by the congressional scheme.

455 U.S. at 155-56. *See also Northwest Airlines, Inc. v. County of Kent*, 510 U.S. 355, 373-74 n.20 (1994).

statute must be given effect. This Court adhered to such an approach in *Northeast Bancorp, Inc. v. Board of Governors of the Fed. Reserve Sys.*, 472 U.S. 159 (1985). In *Northeast Bancorp*, the issue was whether the Douglas Amendment to the Bank Holding Company Act of 1956, 12 U.S.C. § 1842(d), which prohibited the Federal Reserve Board from approving an acquisition by a bank or bank holding company located in one state of a bank located in another, unless the acquired bank's state laws permitted such acquisitions, also permitted a state to permit such cross-border acquisitions selectively, depending on reciprocity from other states. In considering a proposed acquisition, the Board had held that such selective lifting of the ban was authorized by the Douglas Amendment. Citing the Board's status as "an authoritative voice on the meaning of a federal banking statute," this Court agreed with the Board and held that the dormant Commerce Clause had been displaced. 472 U.S. at 168. EPA's application of the RCRA consistency standard is no less authoritative, and should have been given similar deference here.

In other words, under *South-Central Timber* it is not "Congressional intent" expressed solely in terms of legislative history, but *federal law*, that must authorize the State's laws in an "unmistakably clear" fashion. Here, both Congress and EPA have acted under the power granted by the Commerce Clause in creating the RCRA consistency standard and the "reasonableness" test of Section 271.4(a)—Congress directly and EPA by statutory authorization. EPA's application of the consistency standard of RCRA is unchallenged here and there is no reason why it should not be given effect as arising from the *exercise* of the Commerce Clause power. The court of appeals' holding to the contrary consigns the RCRA consistency standard as applied by EPA to a netherworld: despite ostensibly being valid federal law, it has been accorded no actual effect on the very interstate relation-

ships it aims to address. *Merrion, White,* and *Northeast Bancorp* do not permit such a result.

Moreover, under RCRA and CERCLA Congress has, in addition to adopting a substantive standard at odds with that of the dormant Commerce Clause, also "affirmatively acted by providing a series of federal checkpoints that must be cleared" before a state law can receive federal authorization. *Merrion,* 455 U.S. at 155. In stating that Congress had not provided federal checkpoints, 98 F.3d at 784, *App.* 16a, the court of appeals ignored EPA's approval of South Carolina's capacity assurance plan in 1990, *see supra,* at 9, and its approval of South Carolina's hazardous waste program in a series of actions over several years, culminating in full approval in 1995, *see supra,* at 6, 9. EPA gave its approval of the capacity assurance plan only after first looking explicitly at effects on interstate commerce. *See supra,* at 9.[14]

For RCRA, EPA's rules contemplate that the Agency may undertake review at any time, either acting *sua sponte* or on petition "from an interested person." 40 C.F.R. § 271.23(b)(1) (procedures for withdrawing approval of State programs). Thus, RCRA provides explicit checkpoints because the "consistency" test must be met and a dissatisfied person has appropriate means—action before the Agency and judicial review—to insure that the test has been satisfied. As in *Merrion,* independent judicial invocation of dormant Commerce Clause analysis would

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[14] EPA did not look at such effects when it gave RCRA approval in 1995 to the full South Carolina program, including the provisions at issue here. Thus, while the court of appeals was wrong when it said that "EPA has not expressly approved any of the contested South Carolina laws," 98 F.3d at 784, *App.* 17a, it was correct in the sense that in EPA's 1995 approval the Agency did not focus on interstate effects. EPA obviously did focus on such effects in giving its approval in 1990 to the provisions submitted as part of the State's capacity assurance program, *see supra,* at 9, and, under EPA's policy, that approval served as a first-stage blessing for purposes of the RCRA consistency process, *see supra,* at 5.

be "duplicative" if not contradictory, and EPA's approval should be given effect until it is removed.[15]

4. ***Synopsis.***

The courts should not strike down what EPA elects to approve in valid pursuit of its congressional mandate to regulate hazardous waste. Given EPA's approval under RCRA and CERCLA, the notion that Congress' Commerce Clause power nonetheless still lies "dormant" with respect to the challenged provisions is unsupportable. South Carolina's EPA-approved laws and rules cannot be challenged under the dormant Commerce Clause any more than could action taken by the federal agency itself.[16]

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[15] Cases in which the Court has held that the exercise of Congress' Commerce Clause power has not been sufficiently clear to insulate a state provision from dormant Commerce Clause review involve nothing like the present context. In *South-Central Timber, supra*, Alaska's discriminatory requirement that timber sold from state lands be processed locally was rejected. Although a federal statute created a similar policy with respect to federal lands, it did not address state laws in any respect. Thus, the reason the Court found no "unmistakably clear" intent by Congress to displace dormant Commerce Clause restrictions was that the federal statute had no bearing on the state program. 467 U.S. at 92-93. *New England Power Co. v. New Hampshire*, 455 U.S. 331, 341 (1982), involved New Hampshire's attempt to prohibit exportation of hydroelectric power on the basis of a "savings clause" in the Federal Power Act which preserved the States' "lawful authority now exercised over the exportation of hydroelectric energy." The Court held that the clause only preserved *already valid* authority—*i.e.* authority exercised within the limits of the dormant Commerce Clause. *Id.* In *Sporhase v. Nebraska*, 458 U.S. 941 (1982), Nebraska defended its prohibition against extraction of its groundwater for use outside the State without citing any directly relevant statute, but rather it simply relied on "37 statutes in which Congress has deferred to state water law, and on a number of interstate compacts dealing with water." *Id.* at 958. Accordingly, the Court found no direct "indicat[ion] that Congress wished to remove federal constitutional constraints on such state laws." *Id.* at 960.

[16] The regulatory model used by Congress under RCRA—enactment of federal minimum standards with provisions allowing

The present case thus squarely presents an instance of Congressional authorization—through the adoption of the competing RCRA standard—which has been absent from prior cases before this Court. For example, in *C&A Carbone, supra,* which involved a municipality's "flow control" ordinance directing solid non-hazardous waste to a local facility, Justice O'Connor's concurring opinion noted Congress' "delegation . . . to EPA of authority to assist local government in solving waste supply problems," 511 U.S. at 409-410 (O'Connor, J., concurring), but concluded that EPA's regulations merely echoed the dormant Commerce Clause's requirement of "free and unrestricted movement" of waste. *Id.* Similarly, in *Northwest Airlines, Inc. v. County of Kent, supra,* 510 U.S. at 373, the Court was presented with the issue of whether the "express permission" in the Anti-Head Tax Act, 49 U.S.C. § 1513(b), of "reasonable rental charges, landing fees, and other service charges from aircraft operators for the use of airport facilities" was "[s]ufficiently clear to rule out judicial dormant Commerce Clause analysis." In the absence of agency implementation of the AHTA, however, the Court held that the AHTA "reasonableness" standard was no different than that of the dormant Commerce Clause. 510 U.S. at 374. Here, the conflict between the RCRA "consistency" standard and the dormant Commerce Clause has been both explicated and implemented by the Agency. Indeed, EPA has expressly approved as not "unreasonable" under Section 271.4 precisely the sort (though not the degree) of differential fees for in-state and out-of-state waste which this Court struck down in *Chemical Waste Management, supra,* while "pretermit-

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States to implement federal requirements through their own programs—has also been used in a number of other environmental regulatory statutes. *See, e.g.,* Solid Waste Disposal Act, 42 U.S.C. § 6991c(d)(2) (1995); Clean Air Act, 42 U.S.C. § 7411(c) (1995); Federal Water Pollution Control Act, 33 U.S.C. § 1342(c)(1) (Supp. 1996); Surface Mining Control and Reclamation Act, 30 U.S.C. §§ 1235, 1253 (1986 & Supp. 1996); Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. § 136w-1 (1980 & Supp. 1996).

[ting]" the RCRA authorization issue to a later time. *Compare* note 1, *supra, with Chemical Waste Management,* 504 U.S. at 338-339 & 346 n.9. With the maturity of the instant case, that time has come.

B. Neutral Provisions In South Carolina's Program.

The court of appeals improperly analyzed two provisions of South Carolina's regulatory program—provisions that are not in any way discriminatory. Whatever standards for judging interstate effects are applicable, its ruling that the provisions are invalid is contrary to this Court's precedents.

South Carolina's neutral overall cap on the amount of hazardous waste disposed of by landfill is permissible under any test for evaluating effects on interstate commerce. Act No. 590, S.C. Ann. 44-56-60(a)(2), *App.* 129a, reduces the cap from its prior level of 135,000 tons per year to new, phased levels first of 120,000 tons and then of 110,000 tons. The court of appeals acknowledged that this Court has held that among the less discriminatory alternatives available to States seeking to restrict disposal of hazardous waste consistent with the requirements of the dormant Commerce Clause is " 'an evenhanded cap on the total tonnage landfilled . . . [which would] curtail volume from all sources.' " 98 F.3d at 787, *App.* 23a, quoting *Chemical Waste Mgmt.,* 504 U.S. at 345. The court of appeals ruled that the *reduction* in the cap was not evenhanded [17] because the statutory amendment providing for the reduction also provided for two exceptions: one triggered by a certification that waiver of the limit is necessary to protect South Carolina's citizens, S.C. Code Ann.

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[17] The effect of the rulings in this regard by the district court and the court of appeals was to reinstate the pre-Act No. 590 cap of 135,000 tons per year of hazardous waste disposed by landfill in South Carolina. This result illustrates the incongruity of the court of appeals' decision. Under its ruling, a cap of 120,000 tons per year or of 110,000 tons per year is impermissible, but a cap of 135,000 tons per year is valid.

§ 44-56-60(a)(3)(A), and the other by a finding that the entire statutory limit of landfilled hazardous waste was generated by South Carolina sources.[18] The court of appeals found the exceptions to be discriminatory and to disable the reduced cap. 98 F.3d at 788, *App.* 24a. It also opined that even if the reduced limit were neutral, it would not be severable. *Id.* at 788 n.21, *App.* 24a. Its analysis is wrong on both counts, and exemplifies the broad sweep of its decision to set aside state law.

Similarly, South Carolina's "needs regulation" is a non-discriminatory provision, both on its face and in practical effect. It simply does not affect what hazardous wastes private facilities accept for treatment and disposal. The court of appeals stated that the "effect on out-of-state interests is to prohibit facilities from expanding to meet out-of-state needs, but to allow expansion to meet in-state needs." 98 F.3d at 788, *App.* 25a. The court further translated the provision as an allowance for "expansion or a raise in the limits where in-state needs dictate such a rise." *Id.* There is no factual record to support any assumption at all about the *use* of an expansion in capacity, let alone that such an expansion would be dedicated to in-state needs. There certainly also is not any evidence that facilities would be planned and permitted any time there was an excess of in-state waste needing disposal but not otherwise. The case below was decided on summary judgment, without any factual development whatsoever. In

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[18] The court of appeals took no facts into account in its assessment of the exceptions. However, facts before the court, which South Carolina had put forward by way of affidavits to resist summary judgment in the district court, showed that the in-state percentage of wastes disposed subject to the cap was 11.91% for 1993 (11,972.18 tons), while the remainder (88.09%) came from out-of-state (88,527.66 tons). (Joint Appendix before court of appeals, at JA 0700.) For the first two quarters of 1994, the percentage and amounts of hazardous waste disposed in South Carolina subject to the cap were comparable. (*Id.* at JA 0702-0703.) Thus, the likelihood that the second exception would have any practical consequence was nil.

short, whether evaluated under the "reasonableness" test set out in EPA's implementing regulations, or under a dormant Commerce Clause test such as the balancing test of *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970),[19] South Carolina's reduced disposal cap and its needs regulation pass muster.

C. Referral to EPA Under the Primary Jurisdiction Doctrine

South Carolina raised the issue of primary jurisdiction before the district court and sought a referral to EPA because the court of appeals had earlier, in its decision on appeal from the district court's preliminary injunction, expressed frustration with EPA's variously expressed views about the meaning of the "consistency" provision of RCRA and the Agency's own implementing rules. *See HWTC*, 945 F.2d at 794, *App.* 76a, quoted *supra*, at 11 n.8. Both the district court and then the court of appeals nonetheless refused to order referral on the basis of their erroneous conclusions that EPA's decision respecting the federal statute and regulation would be irrelevant. This view ignores that the question of federal statutory construction must be resolved as a first step in this case. Regarding that question of interpretation, both the district court and the court of appeals fundamentally misperceived the nature and purpose of referral under the primary jurisdiction doctrine.

The question of what types of state laws are authorized for approval under RCRA is an issue within the special expertise of EPA. The doctrine of primary jurisdiction exists to permit courts to take advantage of agency expertise rather than attempt to answer, in the first instance, complicated questions of law and fact relating to an agency's exercise of its statutory powers. In this case,

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[19] The *Pike* test applies if a State's law regulates evenhandedly but adversely affects interstate commerce in its application. Such a law is valid unless the burdens on commerce are "clearly excessive in relation to the putative local benefits." *Pike*, 397 U.S. at 142.

any confusion that exists regarding the interpretation or application of the statutory consistency requirement and of EPA's consistency regulation should be resolved by referral to EPA under the doctrine of primary jurisdiction. *See Ricci v. Chicago Mercantile Exchange, supra*, 409 U.S. at 307; *see also Northwest Airlines, supra*, 510 U.S. at 366 n.10 (noting that the question as to the "reasonableness" of the respondent airport's rates under the Anti-Head Tax Act "might have been referred . . . to the Department of Transportation under the primary jurisdiction doctrine").[20]

In reviewing the district court's decision not to refer the questions of statutory and regulatory interpretation to EPA, the court of appeals noted that the district court had refused to make the referral because it had found "that there were no issues of fact." 98 F.3d at 789, *App.* 26a.[21] If only questions of law were at issue, the question also arises why the court of appeals reviewed the district court's decision for abuse of discretion. While a decision to refer a case to the primary jurisdiction of an agency is generally labeled a discretionary one, where, as in this case, the district court's decision was based wholly on conclusions of law, the court of appeals should accordingly

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[20] If the "consistency" standard is held to displace the dormant Commerce Clause, respondent ETC should be required to proceed before EPA not only because EPA has primary jurisdiction, but because ETC cannot state a claim directly under RCRA in federal court. *See Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n*, 453 U.S. 1 (1981) (comprehensive scheme of administrative remedies precludes implied right of action or remedy under 42 U.S.C. § 1983). ETC's proper remedy is to petition EPA to withdraw South Carolina's RCRA authorization, and, if it remains dissatisfied, to seek judicial review of EPA's decision. *See Hazardous Waste Treatment Council v. Reilly*, 938 F.2d 1390 (D.C. Cir. 1991).

[21] Questions of fact were, or at least should have been, at issue, however, as shown by the discussion of the court of appeals' decision to affirm the invalidation of the State's overall cap on waste disposal and the "needs regulation" for permitting new or expanded facilities. *See supra* at 26-27 & n.18.

have reviewed that decision *de novo*. When the district court's determination is based solely on conclusions of law, the court of appeals is in as good a position as the district court to make the determination in the first instance, and accordingly, should proceed to do so. *See Massachusetts v. Blackstone Valley Elec. Co.*, 67 F.3d 981, 991-93 (1st Cir. 1995) (addressing and then ordering referral to resolve "varying positions" stated by EPA whether ferric ferrocyanide is a "cyanide" for purposes of the Agency's rules). This case presents the Court with the opportunity to clarify this aspect of primary jurisdiction doctrine.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

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January 10, 1997

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 95-2008

ENVIRONMENTAL TECHNOLOGY COUNCIL, formerly known as Hazardous Waste Treatment Council, on behalf of itself and its members,

Plaintiff-Appellee,

v.

SIERRA CLUB; ENERGY RESEARCH FOUNDATION; CITIZENS FOR CLEAN AIR AND WATER; CITIZENS ASKING FOR A SAFE ENVIRONMENT, INCORPORATED (CASE); ENVIRONMENTALISTS, INCORPORATED,

Defendants-Appellants,

and

STATE OF SOUTH CAROLINA; DAVID M. BEASLEY, Governor; COMMISSIONER, SOUTH CAROLINA DEPARTMENT OF HEALTH AND ENVIRONMENTAL CONTROL; SOUTH CAROLINA DEPARTMENT OF HEALTH AND ENVIRONMENTAL CONTROL; SOUTH CAROLINA BOARD OF HEALTH AND ENVIRONMENTAL CONTROL,

Defendants.

No. 95-2245

ENVIRONMENTAL TECHNOLOGY COUNCIL, formerly known as Hazardous Waste Treatment Council, on behalf of itself and its members,

Plaintiff-Appellee,

v.

STATE OF SOUTH CAROLINA; DAVID M. BEASLEY, Governor; COMMISSIONER, SOUTH CAROLINA DEPARTMENT OF HEALTH AND ENVIRONMENTAL CONTROL; SOUTH CAROLINA DEPARTMENT OF HEALTH AND ENVIRONMENTAL CONTROL; SOUTH CAROLINA BOARD OF HEALTH AND ENVIRONMENTAL CONTROL,

Defendants-Appellants,

and

SIERRA CLUB; ENERGY RESEARCH FOUNDATION; CITIZENS FOR CLEAN AIR AND WATER; CITIZENS ASKING FOR A SAFE ENVIRONMENT, INCORPORATED (CASE); ENVIRONMENTALISTS, INCORPORATED,

Defendants.

Appeals from the United States District Court
for the District of South Carolina, at Columbia
Matthew J. Perry, Jr., Senior District Judge
(CA-90-1402-3-0)

Argued: March 5, 1996
Decided: October 15, 1996

Before MURNAGHAN and MOTZ, Circuit Judges, and YOUNG, Senior United States District Judge for the District of Maryland, sitting by designation.

OPINION

MURNAGHAN, Circuit Judge:

The appeal before the court concerns South Carolina's attempt to limit the amount of hazardous waste generated

out-of-state and buried within its borders by promulgating a series of executive orders, statutes, and one regulation (collectively "the South Carolina laws") which, as compared to treatment of waste generated within South Carolina, burden out-of-state waste. The discriminating state laws would impact the operations of three commercial hazardous waste facilities owned and operated by members of the appellee-plaintiff Environmental Technologies Council ("ETC").[1] ETC filed a lawsuit challenging South Carolina's laws under the Commerce Clause of the United States Constitution, art. I, § 8, cl. 3, the Supremacy Clause, art. VI, cl. 2, and the Privileges and Immunities Clause, art. IV, § 2 cl. 1, and 42 U.S.C. § 1983 (1988). The question before the court on appeal is whether South Carolina's laws violate the Commerce Clause.[2]

We previously considered a motion by ETC for a preliminary injunction in this same lawsuit based on a Commerce Clause violation. *Hazardous Waste Treatment Council v. State of South Carolina,* 945 F.2d 781 (4th Cir. 1991) ("*HWTC*"). While remanding to the district court, we, for the most part, affirmed the district court's grant of a preliminary injunction in favor of ETC.[3]

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[1] ETC was formerly known as the Hazardous Waste Treatment Council ("HWTC"). ETC is a non-profit association of commercial firms that provide services for the treatment, recycling, and disposal of hazardous wastes.

[2] Because the district court addressed only the Commerce Clause question and our ruling on the Commerce Clause renders the challenged laws invalid, we do not reach the validity of the laws under the Supremacy Clause, Privileges and Immunities Clause, or 42 U.S.C. § 1983.

[3] We instructed the district court on remand "(1) to modify the order by striking the words that confusingly imply a declaration of invalidity, (2) to modify the order to apply only to the specific portions of the executive orders and statutes challenged as violating the Commerce Clause, and (3) to consider explicitly the balance of hardships with respect to Regulation 61-99." *HWTC,* 945 F.2d at 795.

On remand, the district court has granted summary judgment in favor of ETC, issuing a permanent injunction as to all the challenged provisions. *Environmental Technologies Council v. South Carolina,* 901 F. Supp. 1026 (D.S.C. 1995) (*"ETC"*). South Carolina and several intervenors have appealed. For the following reasons, we affirm.

I

Disposing of hazardous wastes is a national problem which raises complex technological and political issues.[4]

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[4] The Resource Conservation and Recovery Act of 1976 ("RCRA") defines "hazardous waste" as

> a solid waste, or combination of solid wastes, which because of its quantity, concentration, or physical, chemical, or infectious characteristics may—
>
> (A) cause, or significantly contribute to an increase in mortality or an increase in serious irreversible, or incapacitating reversible, illness; or
>
> (B) pose a substantial present or potential hazard to human health or the environment when improperly treated, stored, transported, or disposed of, or otherwise managed.

42 U.S.C. § 6903(5).

The increasing problem of disposing of solid wastes—hazardous and non-hazardous—is evidenced by the number of recent lawsuits involving states' or localities' attempts to limit wastes entering their borders. *See, e.g., C & A Carbone, Inc. v. Town of Clarkstown, New York,* 511 U.S. 383 (1994) (local solid waste flow control ordinance requiring all nonhazardous waste to be deposited at locally-owned facility); *Oregon Waste Sys., Inc. v. Department of Envtl. Quality of Oregon,* 511 U.S. 93 (1994) (Oregon statute imposing additional fee on solid waste generated outside the state and disposed of within the state); *Fort Gratiot Sanitary Landfill, Inc. v. Michigan Dep't of Natural Resources,* 504 U.S. 353 (1992) (Michigan law prohibiting private landfill operators from accepting solid waste that originates outside county in which facilities are located unless specifically authorized by the receiving county's plan); *Chemical Waste Management, Inc. v. Hunt,* 504 U.S. 334 (1992) (Montana statute imposing additional fee on all hazardous waste generated out of state and disposed of within state); *City of Philadelphia v. New Jersey,* 437 U.S. 617 (1978) (New Jersey

South Carolina is one of few states which contain commercial hazardous waste treatment, storage, and disposal facilities. Thus, South Carolina absorbs a large amount of the hazardous waste that other states export.

South Carolina's attempt to limit the level of out-of-state hazardous waste entering its borders occurs against a backdrop of congressional legislation addressing the national hazardous waste problem. Congress has enacted three sets of laws which are relevant here: (1) the Resource Conservation and Recovery Act of 1976 ("RCRA"), as amended, 42 U.S.C. §§ 6901-6992k (1988); (2) the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 ("CERCLA"), as amended, 42 U.S.C. §§ 9601-75 (1988); and (3) the Superfund Amendments and Reauthorization Act of 1986 ("SARA"), Pub.L. No. 99-499, 100 Stat. 1613 (1986). We briefly describe each law in so far as it is relevant to the question before us.

A. *RCRA*

RCRA establishes a cradle-to-grave regulatory program for hazardous waste management administered by the Environmental Protection Agency ("EPA"). It attempts to deal with hazardous waste before it becomes a problem by establishing minimum federal standards for the generation, treatment, storage, transportation, and disposal of hazardous waste, and the permitting of facilities to treat hazardous waste. *HWTC*, 945 F.2d at 783. RCRA also allows a state to implement its own program in lieu of

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statute prohibiting importation of most solid or liquid waste generated out of state); *National Solid Wastes Management Ass'n v. Alabama Dep't of Envtl. Management*, 910 F.2d 713 (11th Cir. 1990), *as modified upon denial of reh'g*, 924 F.2d 1001 (11th Cir.), *cert. denied*, 501 U.S. 1206 (1991) (Alabama statute blacklisting certain hazardous wastes generated out of state). In each case listed above a state or locality attempted to discriminate against waste generated out-of-state, and in each case the discriminatory action was ruled a violation of the Commerce Clause.

the federal program if the state's program is "equivalent to" and "consistent with" the federal or state programs applicable in other states and provides for "adequate enforcement of compliance." 42 U.S.C. § 6926(b).

Congress delegated to EPA the task of reviewing and authorizing state programs as consistent with the federal program. The EPA's regulation explaining how a state's program must be consistent with the federal program is of particular relevance to the present controversy. It requires that a state program not unreasonably impede interstate commerce.[5]

B. *CERCLA and SARA*

Passed by Congress in 1980, CERCLA establishes a cleanup program for hazardous waste which has already been disposed of improperly. CERCLA created a fund of federal money available for state cleanup efforts ("Superfund").

Finding that more was still needed to address the hazardous waste problem, Congress amended CERCLA in 1986 by enacting SARA. SARA requires that each state submit a proposal to EPA demonstrating that over a 20-year period the state will have either: (1) adequate capacity available to dispose of hazardous wastes generated within the state; or (2) arrange for the disposal of wastes generated in-state in other states through interregional

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[5] 40 C.F.R. § 271.4 provides:

> To obtain approval, a State program must be consistent with the Federal program and State programs applicable in other States and in particular must comply with the provisions below . . .
>
> > (a) Any aspect of the State program which unreasonably restricts, impedes, or operates as a ban on the free movement across the State border of hazardous wastes from or to other States for treatment, storage, or disposal at facilities authorized to operate under the Federal or an approved State program shall be deemed inconsistent.

agreements. 42 U.S.C. § 9604(c)(9) (1995).[6] The required plans are referred to as Capacity Assurance Plans ("CAPs"). Failure to submit an acceptable CAP results in the state becoming ineligible to receive Superfund money for remedial cleanup of hazardous waste within the state. Congress promulgated no other sanctions or incentives for states to submit CAPs.[7]

C. *South Carolina's Restrictions on the Interstate Flow of Hazardous Waste*

Because South Carolina is one of the few states which has large existing hazardous waste treatment and disposal facilities, it contends that it has borne an unfair share of the national hazardous waste burden. As a result, South Carolina has attempted, through a series of measures, to

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[6] 42 U.S.C. § 9604(c) provides:

(9) Siting

Effective 3 years after October 17, 1986, the President shall not provide any remedial actions pursuant to this section unless the State in which the release occurs first enters into a contract or cooperative agreement with the President providing assurances deemed adequate by the President that the State will assure the availability of hazardous waste treatment or disposal facilities which—

(A) have adequate capacity for the destruction, treatment, or secure disposition of all hazardous wastes that are reasonably expected to be generated within the State during the 20-year period following the date of such contract or cooperative agreement and to be disposed of, treated, or destroyed,

(B) are within the State or outside the State in accordance with an interstate agreement or regional agreement or authority,

(C) are acceptable to the President, and

(D) are in compliance with the requirements of subtitle C of the Solid Waste Disposal Act.

[7] The court refers the reader to its prior opinion in this litigation, *HWTC*, 945 F.2d at 783-85, for further background on RCRA, CERCLA, and SARA.

reduce the amount of hazardous waste entering its borders. South Carolina's legislature passed two statutes, its Governor signed two Executive Orders, and the South Carolina Department of Health and Environmental Control ("DHEC") promulgated one regulation—all of which were designed to limit the level of out-of-state hazardous wastes entering South Carolina for burial within the state.

The first measure enacted was a blacklisting provision, prohibiting entry into the state of certain out-of-state wastes. Section 9 of Act No. 196 of 1989 prohibits "any person who owns or operates a waste treatment facility within" South Carolina from accepting

> any hazardous waste generated in any jurisdiction which prohibits by law the treatment of that hazardous waste within that jurisdiction or which has not entered into an interstate or regional agreement for the safe treatment of hazardous waste pursuant to the federal [CERCLA].

The Act codified a prior executive order, No. 89-17.

The second measure, Act No. 590 of 1990, established a limit on all waste buried within the state.[8] The limit reduces the existing statutory authorization for hazardous waste disposal by burial from 135,000 tons within the state in a year to 120,000 tons from July 1, 1990 to July 1, 1991. After July 1, 1991, the authorization drops to 110,000 tons per year. The limit on waste burial can be lifted, however, upon certification that the burial of more waste is necessary to protect the health and safety of the citizens of South Carolina or that 110,000 tons of the waste buried in South Carolina during the relevant time period was generated in South Carolina only.

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[8] The limit is most often referred to as a cap. We have used the term "limit" here in order to prevent confusion between "cap" and the acronym for Capacity Assurance Plan, "CAP."

The same Act also discriminates between waste generated in-state versus out-of-state by establishing a floor for in-state wastes and a ceiling for out-of-state wastes. All hazardous waste facilities must reserve for waste generated in-state at least the same capacity used during the previous year. On the other hand, no more hazardous waste may be buried from out-of-state than the amount buried in the previous year.

The third measure, executive order No. 89-25 promulgated on July 6, 1989, imposes quota preferences for in-state facilities to reserve at least 54,000 tons per year of the then-current statutory maximum of 135,000 tons for waste generated within South Carolina. It also limits the waste generated from any one state to 35,000 tons per year, and 10,000 tons per quarter.

The fourth and final measure, DHEC Regulation 61-99, effective January 12, 1990, imposes a needs requirement for all permits to establish or expand hazardous waste treatment and storage facilities. Need may be demonstrated by reference to only in-state need.

D. *EPA's Response*

In 1985, EPA approved South Carolina's hazardous waste program under RCRA despite the presence of a discriminatory fee imposed on waste generated out of state. 50 Fed.Reg. 46437 (1985); *HWTC,* 945 F.2d at 785 & n.2.[9] In 1989, EPA expressed concern that the blacklisting provision (Act No. 196 and Exec. Order No. 89-17) could render South Carolina's hazardous waste management program inconsistent with RCRA. Thus, the EPA requested an opinion from the South Carolina Attorney General and certification by the state that the provision was consistent with RCRA. The South Carolina Attorney General responded with an opinion that the provision was

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[9] That fee is not challenged in the instant lawsuit.

"consistent." The record contains no response by EPA or further EPA action.

Shortly thereafter, on October 17, 1989, South Carolina submitted to EPA its proposed CAP. EPA approved the CAP in May 1990, with certain conditions. That approval was granted in the context of an EPA policy of using the CAP process as its first step in addressing state actions which may be inconsistent with RCRA.[10]

Subsequently, in 1995, EPA issued a notice that it had made a final decision, subject to public review and comment, that the agency intended to find that South Carolina's hazardous waste program revisions satisfied all of the requirements necessary for final authorization under RCRA. 60 Fed.Reg. 42046 (Aug. 15, 1995). While the notice does not directly address the provisions at issue here, the notice does indicate that the EPA continues to approve South Carolina's hazardous waste program under RCRA.[11]

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[10] Memorandum from Lee M. Thomas to Regional Administrators, "Policy Regarding Hazardous Waste Management Capacity and RCRA Consistency Issues" (December 23, 1988).

[11] At oral argument, South Carolina asserted that the EPA 1995 RCRA approval specifically addressed one of the challenged provisions at 60 Fed.Reg. 42048, checklist item 17E. Checklist item 17E addresses the federal requirement for "location standards for salt domes, salt beds, underground mines and caves." The federal RCRA regulations addressed were promulgated by EPA on July 15, 1985. The state authority to administer the federal requirements is found at South Carolina Code §§ 44-56-30, 44-56-60(a-c), and 44-56-120. We surmise that South Carolina is referring to § 44-45-60 as being specifically authorized by EPA. Act No. 590 amended § 44-45-60 in 1990 to include the overall limit on waste disposed of by land burial, a ceiling on out-of-state waste, and a floor on in-state waste. From the information before the court, however, we do not presume that EPA specifically addressed and authorized the discriminatory provisions in question here, which were enacted in 1990 and not addressed specifically to the location standards for salt domes, salt beds, underground mines and caves. We do not view the EPA finding as to the particular federal regulation governing location

II

We review the district court's summary judgment ruling under a *de novo* standard of review. *Henson v. Liggett Group, Inc.*, 61 F.3d 270, 274 (4th Cir. 1995); *Jackson v. Kimel*, 992 F.2d 1318, 1322 (4th Cir. 1993). Under Rule 56(c) of the Federal Rules of Civil Procedure, summary judgment is appropriate only where there are no genuine issues of material fact. In conducting our analysis, we review the record in the light most favorable to the nonmoving party.

South Carolina and the intervenors appeal on several grounds. First, South Carolina argues that the district court erred by applying a dormant Commerce Clause analysis because RCRA, CERCLA, and SARA override the dormant Commerce Clause, rendering the Clause inapplicable. Second, South Carolina asserts that even assuming a dormant Commerce Clause analysis applies, there were genuine issues of material fact and, therefore, summary judgment was premature. Third, South Carolina argues that even assuming its laws violate the dormant Commerce Clause, two portions of the laws—the overall limit on in-state waste burial and the needs requirement for new permits—are neutral nondiscriminating provisions and, therefore, should be severed from the invalid provisions and upheld. Finally, South Carolina argues that the district court should not have ruled on the constitutionality of the laws, but instead referred the entire lawsuit to the EPA under the doctrine of primary jurisdiction. We address each argument in turn.

We caution at the beginning of our discussion that, as we recognized in our previous opinion in this case, "what-

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standards for salt domes, salt beds, underground mines and caves as specifically addressing and authorizing the overall limit on hazardous waste burial and the ceilings and floors in question. Thus, based upon the record before the court, we disagree with South Carolina's contention that EPA has specifically addressed and authorized some of the challenged provisions.

ever our own view may be about the effectiveness of what Congress or [South Carolina] has done [and the seriousness of the hazardous waste management problem that plagues our nation], we can only apply the law." *HWTC*, 945 F.2d at 783 (citing *National Solid Wastes Management Ass'n v. Alabama Dep't of Envtl. Management*, 910 F.2d 713, 715-16 (11th Cir. 1990), *as modified upon denial of reh'g*, 924 F.2d 1001 (11th Cir. 1991), *cert. denied*, 501 U.S. 1206 (1991)).

A. *The Dormant Commerce Clause*

The Commerce Clause provides that "[t]he Congress shall have Power . . . [t]o regulate Commerce . . . among the several States." U.S. Const. art. I, § 8, cl. 3. Although "phrased as a grant of regulatory power to Congress, the Clause has long been understood to have a 'negative' aspect that denies the States the power unjustifiably to discriminate against or burden the interstate flow of articles of commerce." *Oregon Waste Sys., Inc. v. Department of Envtl. Quality*, 511 U.S. ——, ——, 114 S. Ct. 1345, 1349 (1994). Thus, with certain exceptions, the negative or dormant Commerce Clause prohibits states from discriminating against the free flow of interstate commerce.[12]

Where Congress has acted in an area specifically authorizing state or local government action, the dormant Commerce Clause is, however, inapplicable, even if the state interferes with interstate commerce. *Northeast Bancorp. v. Board of Governors of the Fed. Reserve Sys.*, 472 U.S. 159, 174 (1985); *White v. Massachusetts Council of Constr. Employers, Inc.*, 460 U.S. 204, 213 (1983). South Carolina contends that through enacting RCRA, CERCLA, and SARA, Congress created a federal scheme to address the disposal of hazardous wastes which author-

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[12] The Commerce Clause applies to the interstate flow of hazardous waste. *Chemical Waste Management*, 504 U.S. at 340 n.3.

ized the state laws challenged here, thus displacing the dormant Commerce Clause.

In order for a state law to be removed from the reach of the dormant Commerce Clause, however, congressional intent to authorize the discriminating law must be either "unmistakably clear" or "expressly stated." *South-Central Timber Dev., Inc. v. Wunnicke,* 467 U.S. 82, 91-92 (1984). Congress need not state that it intends to override the dormant Commerce Clause, but it must affirmatively have contemplated the otherwise invalid state legislation. *Id.*

South Carolina contends that Congress did just that on a number of levels. First, South Carolina insists that under RCRA, Congress has expressly authorized any state law or program addressing hazardous wastes which meets EPA's consistency standard of "reasonableness." 40 C.F.R. § 271.4. Second, South Carolina argues that through delegating the authorization of state programs to the EPA under RCRA and CERCLA, Congress created a system of checkpoints for a state's hazardous waste program. South Carolina contends that by providing the checkpoints, Congress has "affirmatively" authorized the state laws because they are contained in an EPA-approved RCRA program and CAP. *See Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 155 (1982). Finally, South Carolina argues that the CAP requirement affirmatively contemplates and sanctions states discriminating against other states' wastes. Regional agreements, South Carolina asserts, will require that states set aside capacity for states party to the agreement, thus necessitating discrimination among the states. Furthermore, South Carolina contends it must favor its own wastes in order to assure the capacity for in-state wastes it has demonstrated in its CAP.

We previously found at the preliminary injunction stage that RCRA, CERCLA, and SARA did not contain any language indicating "an unmistakably clear congressional intent to permit states to burden interstate commerce."

HWTC, 945 F.2d at 792. Neither South Carolina, nor the intervenors have come forward with any further persuasive evidence indicating that Congress intended to permit the states, directly or by EPA authorization, to engage in actions otherwise violative of the Commerce Clause. *Id.*[13]

More specifically, we reject, as we did before, South Carolina's argument that EPA's reasonableness standard should displace a constitutional dormant Commerce Clause analysis. The EPA's position on what constitutes "reasonableness" has changed over time.[14] While EPA may

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[13] The Supreme Court has not yet addressed this question. In *Chemical Waste Management, Inc. v. Hunt*, 504 U.S. 334 (1992), the Supreme Court pretermitted the issue raised by the amici curiae in that case of whether Congress had authorized a discriminatory fee Alabama imposed on out-of-state hazardous wastes disposed of at commercial facilities located in Alabama. *Id.* at 346 n.9. Applying the dormant Commerce Clause, the Supreme Court held that the discriminatory fee violated the Commerce Clause and declared the law unconstitutional. The Court refused to consider the question of whether the Commerce Clause did not apply at all because that issue had not been a basis for the lower court's decision or briefed and argued by the parties.

[14] EPA has taken seemingly contradictory positions at different times on how it will apply and interpret the consistency requirement. In 1980, EPA adopted the approach taken in a then- recent Supreme Court opinion, *City of Philadelphia v. New Jersey*, 437 U.S. 617 (1978), which applied the dormant Commerce Clause to strike down state statutes discriminating against out-of-state liquid or solid wastes. The Court's approach rested on the premise that state regulations which discriminated facially, in effect or in purpose, were virtually *per se* invalid. *City of Philadelphia*, 437 U.S. at 624-27. Following that precedent, EPA pronounced that under its consistency regulation, § 271.4, any state program which "operates as a ban on the interstate movement of hazardous waste is automatically inconsistent." *HWTC*, 945 F.2d at 793 (citing 45 Fed.Reg. 53395 (1980)).

In 1985, EPA "altered" its approach to the consistency requirement. That year, EPA ruled that under its consistency regulation, the agency would apply a "reasonableness" test to interstate com-

change its position on what "consistency" entails, the Constitution has not changed and, in the absence of a clear Congressional statement authorizing discrimination by the states with respect to hazardous wastes, we must apply the Constitution's dictates. *See C & A Carbone*, 511 U.S. at ——, 114 S. Ct. at 1691-92 (O'Connor, J. concurring) (emphasizing high degree of specificity with which Congress must "explicitly" authorize state law otherwise violating the Commerce Clause).[15]

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merce restrictions. *HWTC*, 945 F.2d at 794 (citing 50 Fed.Reg. 46439 (1985)). Thus, EPA announced that it did "not agree that *any* disparity in treatment between in-state and out-of-state wastes is *per se* unreasonable" seemingly abandoning its prior constitutional standard. *Id.*

[15] The instant case is distinguishable from the opinion on which South Carolina places a great deal of reliance, *White v. Massachusetts Council of Constr. Employers*, 460 U.S. 204 (1983), for its proposition that Congress has authorized the State's laws through RCRA and CERCLA. In *White*, the Mayor of Boston, Massachusetts issued an executive order requiring all construction projects funded by the city to be performed by workers at least half of whom were bona fide residents of Boston. The order was challenged as violating the Commerce Clause. The Supreme Court upheld the Mayor's order, finding that Boston acted as a market participant in spending the city's money. There is a well-settled exception to the dormant Commerce Clause for states or cities acting as market participants as opposed to government regulators of the market. *Id.* at 206-08. Additionally, the Court noted that although federal funds were also implicated, Congress had specifically contemplated and directed that those funds be used in a similar manner to the city's money: to stimulate economic recovery; to create permanent jobs; to retain jobs that would be lost; to provide jobs to lower income persons and minorities, including the unemployed; and to retrain workers. *See, e.g.*, 42 U.S.C. §§ 3131, 5318. Furthermore, the regulations implementing Congress's directives contained similar mandates, affirmatively permitting the type of parochial favoritism contained in the Mayor's executive order. *White*, 460 U.S. at 213-14 n.11. Thus, the preference for local employment had been expressly contemplated and authorized by Congress. In contrast, here, Congress merely contemplated that state RCRA programs be consistent with the federal and other states' approved programs. Congress did not contemplate

We also find that Congress has not provided a series of checkpoints which authorize discrimination by South Carolina against other states' hazardous wastes. South Carolina relies on *Merrion v. Jicarilla Apache Tribe,* 455 U.S. 130 (1982), for the proposition that a series of congressionally created checkpoints for a state's law authorizes the state to discriminate against interstate commerce. The facts of *Merrion,* however, are distinguishable.

In *Merrion,* the Court upheld, in the face of a Commerce Clause challenge, a tax imposed by the Jicarilla Apache Indian Tribe on oil and gas extracted from tribal reservation land. The Court found that the Tribe had the power as an independent sovereignty to impose the tax. *Id.* at 136-52. The Court also noted that the tax would survive dormant Commerce Clause scrutiny, if applied, because Congress had displaced the Commerce Clause by providing a series of precise federal checkpoints that must be cleared before such a tax could be implemented. *Id.* at 154-56. Congress required that under the Indian Reorganization Act, 25 U.S.C. §§ 476, 477, "a tribe . . . obtain approval from the Secretary [of the Interior] before it adopts or revises its constitution to announce its intention to tax nonmembers." *Id.* at 155. Congress was also aware that Indian tribes impose taxes of the sort in question. *Id.* at 156. Furthermore, the tax had been expressly approved by the Secretary through the checkpoints established for such taxes. *Id.* at 155-56. Thus, Congress expressly authorized such taxes being implemented by Indian Tribes if approved by the Secretary of the Interior.[16]

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nor direct that state RCRA programs implement economic barriers to hazardous waste from other states. Nor do the EPA's regulations affirmatively and expressly authorize economic barriers to the interstate movement of hazardous wastes.

[16] The Court further concluded that the tax would survive Commerce Clause scrutiny because it did not discriminate against interstate commerce in violation of the Commerce Clause. *Merrion,* 455 U.S. at 156-58. The tax had a substantial nexus with the taxing

In contrast, here, one cannot say that Congress expressly contemplated or authorized violations of the dormant Commerce Clause by states limiting access to their hazardous waste facilities when it enacted RCRA, CERCLA, and SARA. Thus, no congressionally established "checkpoints" expressly anticipate or authorize the challenged state laws. Furthermore, the EPA has not expressly approved any of the contested South Carolina laws.[17]

We also reject South Carolina's argument that the CAPs requirement contemplates and requires that South Carolina discriminate against out-of-state waste in order to assure capacity for its in-state waste and to fulfill its interregional agreements. In our prior opinion, *HWTC*, 945 F.2d at 794-95, we stated that CERCLA requires only

> an "assurance" of twenty-year availability of arranged adequate capacity. It does not [require] that the state must ensure that hazardous waste actually is treated and disposed of either in-state or pursuant to an interstate or regional agreement. CERCLA § 104(c)(9) contemplates that adequate national capacity will exist if each state can assure that it has adequate capacity for in-state generated waste after taking into consideration out-of-state waste that it has agreed to import and in-state waste that it has agreed to export. However, no part of § 104(c)(9) appears to permit or require a state to limit its actual in-state capacity to in-state waste to receive Superfund money. *See* OSWER Directive 9010.00a at 4, 6. In fact, it appears that, if a state refuses to build in-state facilities or make alternate arrangements, it will be denied

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Tribe, was fairly apportioned, related to the services provided by the Tribe, and was nondiscrimniatory because it was imposed on minerals sold on the reservation and minerals transported off the reservation before sale. *Id.*

[17] Even if EPA had expressly approved the laws in question, we could not do so without express congressional authorization.

> Superfund money, even if, in reality, all in-state generated waste is safely exported. If congressional intent had been to subject citizens of recalcitrant states to environmental danger by barring export of otherwise untreated and undisposed of hazardous waste, it could have been easily made clear. "A state not in compliance with this section may not export any waste." In the absence of such intent, we suspect that Congress believed the penalty of no access to federal Superfunds for waste cleanup would be sufficient.

South Carolina has not presented any evidence sufficient to dissuade us of our prior thinking. Furthermore, as the Eleventh Circuit noted in responce to a similar argument, if the state's CAP depends on capacity provided by a commercial, privately owned management facilty, the state can contract with that private facility for that capacity, instead of blocking the private facility from accepting wastes from other states. *National Solid Wastes Managament Ass'n,* 910 F.2d at 720-21 (rejecting similar argument that SARA expressly authorized state law discriminating against out-of-state hazardous waste); *Alabama v. EPA,* 871 F.2d 1548, 1555 n.3 (11th Cir.) (finding that Congress had not overridden Commerce Clause through enacting CERCLA) *cert. denied,* 493 U.S. 991 (1989). Thus, we apply a dormant Commerce Clause analysis to South Carolina's laws.

B. *Application of Dormant Commerce Clause*

We apply a two-tiered analysis to state actions allegedly violating the dormant Commerce Clause. The first tier, "a virtually *per se* rule of invalidity'" applies where a state law discriminates facially, in its practical effect, or in its purpose. *Wyoming v. Oklahoma,* 502 U.S. 437, 454-55 (1992) (quoting *City of Philadelphia,* 437 U.S. at 624). In order for a law to survive such scrutiny, the state must prove that the discriminatory law "is demonstrably justi-

fied by a valid factor unrelated to economic protectionism," *New Energy Co. of Ind. v. Limbach*, 486 U.S. 269, 274 (1988), and that there are no "nondiscriminatory alternatives adequate to preserve the local interests at stake," *Hunt*, 504 U.S. at 342 (quoting *Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333, 353 1977)). To date, the Supreme Court has upheld such discriminatory laws only where the discrimination was justified by the threat of death or disease. *See, e.g., Maine v. Taylor*, 477 U.S. 131 (1986) (upholding Maine's prohibition on importing live baitfish because of the potential for destruction of Maine's fisheries); *Clason v. Indiana*, 306 U.S. 439 (1939) (upholding Indiana's restrictions on transporting dead animals without a license because of the potential for disease).

The second tier applies if a statute regulates evenhandedly and only indirectly affects interstate commerce. In that case, the law is valid unless the burdens on commerce are "clearly excessive in relation to the putative local benefits." *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970).

The line between the *per se* rule and the *Pike* balancing test is not clear. Nonetheless, most of the provisions at issue here are not close calls—they clearly discriminate against out-of-state waste either facially, in effect, or in purpose. The blacklisting provision, floor for in-state wastes, ceiling for out-of-state wastes, and quotas for out-of-state and in-state wastes facially discriminate against out-of-state wastes by refusing admittance into South Carolina of certain wastes and giving express preference over South Carolina capacity to in-state wastes. Their effect, if implemented, would also clearly discriminate against out-of-state wastes. As for purpose, we have no reason to reverse the district court's finding that the laws in question constitute "an integrated and interconnected discriminatory program," *ETC*, 901 F.Supp. at 1029, whereby South Carolina has "attempted 'to isolate itself from a problem common to [the nation] by erecting

a barrier against the movement of interstate trade'," HWTC, 945 F.2d at 791 (quoting *City of Philadelphia*, 437 U.S. at 628).[18]

A state cannot achieve a legitimate economic goal through "the illegitimate means of isolating the State from the national economy." *Wyoming*, 502 U.S. at 456-57 (quoting *City of Philadelphia*, 437 U.S. at 627). The relevant economic unit is the nation, and the Commerce Clause prohibits states from balkanizing into separate economic units. *H.P. Hood & Sons, Inc. v. Du Mond*, 336 U.S. 525, 537-38 (1949). Thus, South Carolina faces a heavy burden in justifying its discriminatory practices. To survive summary judgment, South Carolina must demonstrate issues of fact regarding whether the laws are justified by a valid factor unrelated to economic protectionism and, if so, that there are no neutral alternatives available.

While South Carolina failed to articulate precisely its purpose in discriminating against out-of-state waste, the district court found several motivating concerns. The district court first found that South Carolina was motivated by the state's concern for the "health, safety, and welfare of its citizens." *ETC*, 901 F.Supp. at 1033-34. There is "no basis to distinguish out-of-state waste from domestic waste" over concern for citizens' health, safety, and welfare, however. Hazardous waste is equally dangerous whether generated within South Carolina or out-of-state. *See Chemical Waste Management*, 504 U.S. at 344-45 (holding that hazardous waste's danger to the health and safety of Alabama's citizens "does not vary with the point of origin of the waste"); *HWTC*, 945 F.2d at 792 (citing *City of Philadelphia*, 437 U.S. at 629).

The State's second concern was with preserving existing disposal capacity for waste generated within South Caro-

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[18] For example, the stated purpose of Act No. 196 (blacklisting provision) is to "give preference to hazardous waste generators within" South Carolina. Act No. 590 gives the same preference to hazardous waste generators within the state.

lina. *ETC*, 901 F.Supp. at 1034. Natural resources, however, may not be hoarded under the Commerce Clause. "[A] State may not accord its own inhabitants a preferred right of access over consumers in other States to natural resources located within its borders." *City of Philadelphia*, 437 U.S. at 627; *see also New England Power Co. v. New Hampshire*, 455 U.S. 331, 338 (1982). Thus, "[t]he burden . . . of conserving the State's remaining landfill space should not fall disproportionately on out-of-state interests." *HWTC*, 945 F.2d at 792 (citing *City of Philadelphia*, 437 U.S. at 628).

The third concern the district court found was South Carolina's worries about "transportation risks." *ETC*, 901 F.Supp. at 1034. Just as with the State's concern with health and safety, there is little to distinguish out-of-state waste from in-state waste in this regard. Furthermore, neutral alternatives exist for regulating transportation of all hazardous waste regardless of origin. *Chemical Waste Management*, 504 U.S. at 345-46.

Finally, there was South Carolina's concern that it is shouldering an unfair burden of the nation's hazardous wastes. *ETC*, 901 F.Supp. at 1034. The Commerce Clause does not purport to require fairness among the states in interstate commerce. The "apparent Congressional intent of RCRA and SARA would seem" to be "that hazardous waste be treated and disposed of somewhere, even if spread disproportionately among the states." *HWTC*, 945 F.2d at 792.

On appeal, South Carolina reframes its purposes as: (1) complying with the CAP by guaranteeing capacity; and (2) addressing "orphan" wastes—hazardous waste from a state which prohibits its disposal and has failed to enter into a CAP for its disposal. As previously explained, the CAP requirement does not require or contemplate that a state discriminate against out-of-state waste in order to comply. Nor does the Commerce Clause allow states to punish other states for not disposing of

their wastes through a CAP or otherwise. That task is left exclusively to Congress.

In briefing its appeal, South Carolina pointed to no specific issue of fact as to any potential purpose for discriminating against out-of-state waste. Rather, the State merely argued that it is entitled to present evidence that it has no alternative but to differentiate among out-of-state wastes to protect its citizens' health and safety and to comply with CERCLA.

At the summary judgment stage, South Carolina has a burden to demonstrate disputed issues of material fact. South Carolina has failed to meet its burden. None of the affidavits South Carolina submitted even purport to justify South Carolina's discriminatory treatment of out-of-state wastes. *ETC*, 901 F.Supp. at 1030.[19] Nor do any of the affidavits purport to demonstrate that no neutral alternatives exist to discrimination.

C. *Limit on Waste Buried In-State and Needs Requirement*

As for two portions of the South Carolina laws, it is not so obvious, however, that they discriminate either facially, in effect, or in purpose, such that the *per se* test applies. South Carolina therefore argues that even if we find that the dormant Commerce Clause applies and that the laws are invalid, portions of the laws—the overall limit imposed by Act No. 590 and the needs requirement imposed by DHEC regulation 61-99—do not discriminate against interstate commerce. Therefore, South Carolina contends, the valid portions should be severed from the invalid portions and remain in effect. We disagree.

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[19] South Carolina merely presents a series of affidavits that describe its hazardous waste program; the amount of wastes buried in state, broken down by in-state and out-of-state wastes; and similar statistics.

1. *Limit*

An evenhanded cap or limit uniformly burdens both in-state and out-of-state interests. *See, e.g., Chambers Medical Technologies of S.C. v. Bryant*, 52 F.3d 1252, 1258 (4th Cir. 1995). Thus, the Supreme Court has held that the dormant Commerce Clause allows a state to impose "an evenhanded cap on the total tonnage landfilled" with hazardous waste when it "curtail[s] volume from all sources." *Chemical Waste Management*, 504 U.S. at 345. South Carolina contends that its reduction of the statutory authorization of 135,000 tons per year to 120,000 tons and then 110,000 tons is an evenhanded neutral limit that does not burden interstate commerce any more than intrastate commerce.[20]

The limit South Carolina seeks to have upheld, however, is not as evenhanded and neutral as the state would have the court believe. The limit does not have the same effect on in-state as out-of-state wastes because the limit can be lifted upon certification that it is necessary to protect South Carolina's citizens, S.C. Code Ann. § 44-56-60(a)(3)(B) (Law Co-op Supp. 1995), or that the entire statutory authorization of buried waste during the relevant 12-month period was generated in South Carolina, S.C. Code Ann. § 44-56-60(a)(3)(B) (Law Co-op Supp. 1995). The same exceptions are not granted to out-of-state interests. The Supreme Court has declared that "[t]he commerce clause forbids discrimination, whether forthright or ingenious. In each case it is our duty to determine whether the statute under attack, whatever its name may be, will in its practical operation work

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[20] South Carolina also contends that we expressly excluded the overall limit as one of the items properly enjoined in our previous opinion addressing the preliminary injunction. *HWTC*, 945 F.2d at 787 n.9. While we referenced the statutory section containing the limit in our list of sections to be enjoined, we specifically referred to another subsection. Today, however, for the reasons set forth below, we clarify that the limit is included as one of the items that violates the Commerce Clause.

discrimination against interstate commerce." *West Lynn Creamery, Inc. v. Healy*, 511 U.S. ——, ——, 114 S. Ct. 2205, 2215-16 (1994) (citing *Best & Co. v. Maxwell*, 311 U.S. 454, 455-56 (1940); *Maryland v. Louisiana*, 451 U.S. 725, 756 (1981); *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117, 147 (1978)). Here, the exception favors in-state interests over out-of-state interests. Thus, the overall limit is not facially neutral, but rather discriminatory and, therefore, subject to the same *per se* test applied to the other discriminatory provisions of Act 590. The limit fails to survive such scrutiny for the same reasons that the floors and ceilings in Act 590 failed.[21]

2. *Needs Requirement*

The needs regulation requires that a permit application for new or expanded hazardous waste facilities demonstrate need by reference to the level of waste generated in

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[21] Even if the limit were nondiscriminatory, it would not be severable. State law governs the severability of a state statute. *Muller v. Curran*, 889 F.2d 54, 57 (4th Cir. 1989), *cert. denied*, 493 U.S. 1074 (1990). Thus, in determining whether the overall limit can be severed, we turn to South Carolina law. Under South Carolina law, "[t]he test for severability is whether the constitutional portion of the statute remains 'complete in itself, wholly independent of that which is rejected, and is of such a character as that it may fairly be presumed that the Legislature would have passed it independent of that which is in conflict with the Constitution.'" *Thayer v. South Carolina Tax Comm'n*, 413 S.E.2d 810, 814-15 (S.C. 1992) (citing *Shumpert v. South Carolina Dep't of Highways & Public Transp.*, 409 S.E.2d 771 (1991)) (footnote omitted).

We cannot fairly presume that the South Carolina legislature would have passed the overall limit without the provision allowing the limit's increase if South Carolina wastes exceeded the cap. Nor can we assume that the limit would have been passed without the remaining provisions of the statute, which include floors for in-state-wastes and ceilings for out-of-state wastes. By protecting capacity for in-state interests, the legislature may have quelched in-state political interests that might otherwise have lobbied against the overall limit. Thus, we conclude that the limit provision is not severable.

South Carolina only. South Carolina contends that the needs requirement is neutral, functioning similarly to an evenhanded cap and therefore valid. In our earlier opinion, we found that "[o]n its face [the needs requirement] appears not to regulate evenhandedly. It permits South Carolina to refuse to allow new construction if all of its waste can be disposed of by exportation. The 'practical effect' . . . of the regulation may be to favor in-state interests over out-of-state interests." *HWTC*, 945 F.2d at 791 n.14 (citation omitted). Indeed, currently, the practical effect may be to establish a ban on building new capacity.

We find that the needs requirement is not similar to an evenhanded cap with the same effect on both in-state and out-of-state interests. The effect on out-of-state interests is to prohibit facilities from expanding to meet out-of-state needs, but to allow expansion to meet in-state needs. Thus, just as with the overall limit in question, the needs requirement contains an exception for in-state needs allowing expansion or a raise in the limit where in-state needs dictate such a rise. While the limit once imposed applies equally to out-of-state and in-state wastes, in effect, it guarantees in-state generators of waste space because the limit can always be raised in order to meet in-state needs.

Therefore, we apply the *per se* test to Regulation 61-99.[22] The needs regulation does not survive the *per se* test for

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[22] South Carolina's reliance on *Chambers Medical Technologies of South Carolina v. Bryant*, 52 F.3d 1252 (4th Cir. 1995), does not aid its cause. South Carolina seeks to establish that the needs regulation is similar to South Carolina's fluctuating cap for infectious waste based on the amount of waste generated in South Carolina alone. In *Chambers*, we held that the fluctuating cap for infectious waste might pass Commerce Clause scrutiny if it regulated in an evenhanded fashion and had only incidental effects on interstate commerce; whereas it would not be constitutional if it discriminated facially, in effect, or in purpose, thus necessitating that the *per se* test be applied. *Id.* at 1262. Here, the regulation discriminates in effect. Thus, the *per se* test applies.

Furthermore, significantly, we noted that the fluctuating cap in *Chambers* did not operate as a ban on the expansion of facilities.

the same reasons the remainder of the challenged South Carolina laws failed to survive. South Carolina has raised no issue of fact as to a state rationale unrelated to the origin of the waste for its needs requirement.

D. *Primary Jurisdiction*

Finally, South Carolina attempts to persuade us that the district court erred by failing to defer under the doctrine of primary jurisdiction to the EPA in the first instance as to whether South Carolina's laws are constitutional.[23] "No fixed formula exists for applying the doctrine of primary jurisdiction." *United States v. Western Pac. R.R. Co.*, 352 U.S. 59, 64 (1956). Generally speaking, the doctrine is designed to coordinate administrative and judicial decision-making by taking advantage of agency expertise and referring issues of fact not within the conventional experience of judges or cases which require the exercise of administrative discretion. *Id.*; *Commonwealth of Massachusetts v. Blackstone Valley Elec. Co.*, 67 F.3d 981, 992 (1st Cir. 1995); *Mashpee Tribe v. New Seabury Corp.*, 592 F.2d 575, 580 (1st Cir.), *cert. denied*, 444 U.S. 866 (1979), and *cert. denied*, 464 U.S. 866 (1983).

The district judge refused to refer the instant lawsuit to the EPA under the doctrine of primary jurisdiction because he found that there were no issues of fact. Primary

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52 F.3d at 1262. It merely limited the amount of infectious waste any one facility could process. While the South Carolina Code required that a permit be obtained in order to build a new facility and that infectious waste generated out-of-state could only be considered in the needs calculations with DHEC approval, the *Chambers* court assumed that the DHEC would not deny a permit on a basis violating the Commerce Clause. *Id.* at 1262 n.15. Thus, in dicta, we suggested in *Chambers* that outright bans on expansion based on in-state needs only will most likely not survive dormant Commerce Clause scrutiny.

[23] As conceded in oral argument, however, South Carolina has not requested that the EPA intervene in this case as an *amicus curiae*, nor has the EPA sought intervention.

jurisdiction, he held, applied only to the referral of factual, not legal, issues. He further reasoned that the "constitutional issues . . . [at stake were more] properly within the traditional purview of an Article III court, and are not those to which EPA could conceivably lend some degree of expertise." *ETC*, 901 F. Supp. at 1029. We review the district court's decision declining to refer the lawsuit to the EPA under the doctrine of primary jurisdiction for abuse of discretion. *In re Lower Lake Erie Iron Ore Antitrust Litig.*, 998 F.2d 1144, 1162 (3d Cir. 1993), *cert. denied*, 114 S.Ct. 921 (1994).[24]

The district court did not abuse its discretion. The EPA's special expertise is not needed to decide a question of law in a constitutional matter.

Accordingly, the district court's judgment is

AFFIRMED.

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[24] South Carolina contends that the district court's refusal to apply the doctrine of primary jurisdiction was based wholly on erroneous conclusions of laws and should therefore be reviewed *de novo*. "[D]espite what the term [primary jurisdiction] may imply, [it] does not speak to the jurisdictional power of the federal courts. It simply structures the proceedings as a matter of judicial discretion, so as to engender an orderly and sensible coordination of the work of agencies and courts." *In re Lower Lake Erie Iron Ore Antitrust Litig.*, 998 F.2d at 1162 (quoting *United States v. Bessemer & Lake Erie R.R. Co.*, 717 F.2d 593, 599 (D.C. Cir. 1983)). Thus, the decision not to refer a lawsuit to an agency under the doctrine of primary jurisdiction is a discretionary matter which we review for abuse of discretion. Furthermore, because the matter at issue is a constitutional question which lies within this court's expertise, the district court correctly applied the law.

APPENDIX B

[Filed Apr. 13, 1995]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
COLUMBIA DIVISION

Civil Action No. 3:90-1402-0

ENVIRONMENTAL TECHNOLOGIES COUNCIL,
On behalf of itself and its members,
Plaintiff,

-vs.-

STATE OF SOUTH CAROLINA, *et al.*,
Defendants.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

The plaintiff has moved for summary judgment, asserting that there are no genuine issues of material fact and that it is entitled to judgment as a matter of law. Plaintiff seeks a declaration that certain executive orders, statutes and a regulation are invalid under the Interstate Commerce Clause of the United States Constitution.[1] Previously, this Court concluded that the plaintiff would probably prevail on the merits and entered a preliminary injunction. *Hazardous Waste Treatment Council v. South Carolina,* 766 F. Supp. 431 (D.S.C. 1991).[2] That deci-

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[1] "Congress shall have the power . . . . [t]o regulate commerce with foreign Nations, and among the several States, and with the Indian Tribes." U.S. CONST. art. I, § 8, cl. 3.

[2] The plaintiff has now changed its name from "Hazardous Waste Treatment Council" to "Environmental Technologies Council."

sion was affirmed by the United States Court of Appeals for the Fourth Circuit and remanded for modification of the preliminary injunction. 945 F.2d 781 (4th Cir. 1991). Thereafter, the defendants and the intervenors filed motions to modify the preliminary injunction as directed by the Court of Appeals. The plaintiff has filed a motion for summary judgment pursuant to Rule 56, Federal Rules of Civil Procedure. The Court has now considered the extensive memoranda submitted by the parties, together with the oral arguments and now enters its findings of fact and conclusions of law.

I. PRIMARY JURISDICTION

At the September 20, 1994 hearing, this Court denied Defendants' Motion to stay and refer this case to the U.S. Environmental Protection Agency ("EPA") under the primary jurisdiction doctrine. Primary jurisdiction applies only to the referral of relevant *factual,* rather than *legal,* issues to a federal agency. *See Far East Conference v. United States,* 342 U.S. 570, 574 (1952); *Nader v. Allegheny Airlines,* 426 U.S. 290, 304 (1976). In this case, there are no material facts genuinely in dispute, and thus there are no factual issues requiring resolution by EPA.

Moreover, the constitutional issues raised here are properly within the traditional purview of an Article III court, and are not those to which EPA could conceivably land some degree of expertise. *See Environmental Defense Fund v. Wheelabrator Technologies,* 725 F. Supp. 758, 775 (S.D.N.Y. 1989), *quoting Board of Educ. of City School Dist. v. Harris,* 622 F.2d 599, 607 (2d Cir. 1979), *cert. denied,* 499 U.S. 1124 (1981) ("It is well established that the courts need not defer to an agency where the issue involved is a strictly legal one, involving neither the agency's particular expertise nor its fact finding prowess"); *See also Sierra Club v. DOE,* 734 F. Supp. 946, 951 (D. Colo.

1990) ("Where, as here, the issue is strictly legal, a court need not defer to a state agency"). In accordance with the mandate of the Fourth Circuit, this Court concludes that referral to EPA is not appropriate. *Hazardous Waste Treatment Council v. South Carolina,* 945 F.2d 781, 794 (4th Cir. 1991) ("EPA may change its interpretation of its own regulation; however, we cannot change the commands of the Constitution and Congress") ("HWTC II").

II. MOTION TO MODIFY THE PRELIMINARY INJUNCTION

This Court has considered both Plaintiff's Motion for Summary Judgment and Defendants and Intervenors' Motion to Modify the Preliminary Injunction. Because summary judgment is appropriate, any modification of the preliminary injunction is now moot, and the motion to modify is denied. To the extent the permanent injunction issued herewith differs from the January 20, 1991 preliminary injunction, *see Hazardous Waste Treatment Council v. South Carolina,* 766 F. Supp. 431 (D.S.C. 1991) ("HWTC I"), those changes are reflected below.

III. PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

This case challenges South Carolina's discriminatory efforts to regulate the management of hazardous waste services located in the State.[3] At issue are two statutes, two executive orders, and one regulation which constitute an integrated and interconnected discriminatory program.

As this Court and the Court of Appeals concluded at the preliminary injunction stage, the State's discriminatory program violates the Commerce Clause. Because there are

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[3] There are three facilities in South Carolina licensed to handle hazardous waste. The largest, located in Pinewood, is a disposal facility operated by Laidlaw Environmental Services of South Carolina, Inc. *See HWRC I,* 766 F. Supp. at 435.

no material facts in dispute regarding the State's program, summary judgment is appropriate at this stage. *See Philadelphia v. New Jersey,* 437 U.S. 617 (1978); *Chemical Waste Management, Inc. v. Hunt,* 112 S.Ct. 2009 (1992); *Fort Gratiot Sanitary Landfill, Inc. v. Michigan Dep't of Natural Resources,* 112 S.Ct. 209 (1992); *C&A Carbone, Inc. v. Town of Clarkstown, New York,* 114 S.Ct. 1677 (1994); *Oregon Waste Systems, Inc. v. Dep't of Environmental Quality,* 114 S.Ct. 1345 (1994); *National Solid Waste Management v. Alabama Dep't of Env't,* 910 F.2d 713 (11th Cir. 1990), *cert. denied,* 111 S.Ct. 2800 (1991).

Initially, the State and Intervenors must come forward with competent evidence demonstrating a genuine issue of material fact for trial. Fed. R. Civ. P. 56(e). *See Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242 (1986); *Celotex Corp. v. Catrett,* 477 U.S. 317 (1986). Defendants have failed to bring forward any evidence relevant to meeting this burden in the context of a case challenging facial discrimination against interstate commerce. *See, e.g., Wyoming v. Oklahoma,* 112 S.Ct. 789 (1992); *Healy v. Bear Inst., Inc.,* 491 U.S. 324 (1989); *City of Philadelphia v. New Jersey,* 437 U.S. 617 (1978).

In particular, none of the eight affidavits the State has provided raises a material fact in issue. The first, from Lewis Bedenbaugh of the Department of Health and Environmental Control ("DHEC"), addresses Superfund clean-up activities in South Carolina, (Exhibit 1, Defendant's Memorandum In Opposition to Motion for Summary Judgment.) The second and third, both by David Wilson of DHEC, address volumes of hazardous waste being treated, stored and disposed of in South Carolina and the permitting process. (Exhibits 2 and 3.) The fourth, and fifth, both by John Buchanan of DHEC, address the transportation and record-keeping of hazardous waste in South Carolina, and the State enforcement program for haz-

ardous waste facilities. (Exhibits 4 and 5.) The sixth, seventh, and eighth, all by Robert King of DHEC, address 1) hazardous waste management capacities in various states, 2) South Carolina's EPA authorization to administer its own hazardous waste management program, and 3) South Carolina's efforts to enter a Capacity Assurance Regional Agreement. (Exhibits 6-8.) While some of the attachments to these affidavits do provide breakdowns for in-state and out-of-state waste, none of the affidavits even *purports* to justify South Carolina's discriminatory treatment of out-of-state waste.

The State's failure to raise a factual issue for trial demonstrates, as a matter of law, that the State cannot carry its burden under the Commerce's Clause's "strict scrutiny" standard. As the Court of Appeals noted, "[t]he Commerce Clause directly limits the power of the States to discriminate against interstate commerce." *HWTC II*, 945 F.2d at 789, *quoting New Energy Co. of Indiana v. Limbach*, 486 U.S. 269, 273 (1988) ("New Energy"). A facially discriminatory program such as is at issue here is invalid " 'unless the discrimination is demonstrably justified by a valid factor unrelated to economic protectionism.' " 945 F.2d at 790, *quoting Maine v. Taylor*, 477 U.S. 131 (1986). "Justifying discrimination is difficult to say the least." *HWTC II*, 945 F.2d at 790. Where, as here, each of the challenged laws "do not regulate evenhandedly but discriminate on their face against out-of-state hazardous waste," *id.* at n. 13, there is a "virtually *per se* rule of invalidity . . . ." *New Energy*, 486 U.S. at 278-79, *quoting Philadelphia v. New Jersey*, 437 U.S. at 624. Therefore, " 'the strictest scrutiny of any purported legitimate local purpose and of the absence of nondiscriminatory alternatives' " applies. *Wyoming v. Oklahoma*, 112 S. Ct. 789, 801 (1982), *quoting Hughes v. Oklahoma*, 441 U.S. 322, 337 (1979).

At the preliminary injunction stage this Court noted that, "[p]laintiff will likely succeed on the merits in their

challenge to these actions under the Commerce Clause." *HWTC I*, 766 F.Supp. at 441. The Court also noted that, "[I]t may not be gainsaid that the public interest is best served when unconstitutional laws are enjoined." *Id.* at 442. At this stage, as Defendants have not come forward with any evidence demonstrating a genuine issue of material fact regarding the State's purported "legitimate local purpose" or the "absence of nondiscriminatory alternatives," summary judgment is appropriate.

A. *Undisputed Material Facts*

1. *South Carolina's Discrimination Program*

The program challenged here has five interrelated components, comprised of two executive orders, two statutes, and one DHEC regulation. Together they compose one overall program designed to provide a system of preferential treatment for hazardous waste generators in-state at the expense of out-of-state generators. Section 9 of Act No. 196 of 1989, which amends S.C. Code Ann. Section 4456-130, and Executive Order ("E.O.") No. 89-17, the "blacklisting" provisions, prohibit the introduction into South Carolina of any hazardous waste from generators in particular states—those which, as determined by South Carolina: (1) prohibit treatment, storage or disposal of such waste within their borders, or (2) fail to enter into a regional or interstate agreement with South Carolina regarding the management of such wastes. *See HWTC I.* 766 F. Supp. at 436-37. This statute and order also require the State's treatment and disposal facilities to give preference to hazardous waste generators within the State. Section 5, Act No. 196; S.C. Code Ann. 44-56-205; E.O. 89-17. The State and Intervenors have essentially abandoned any argument that these two laws pass muster under the Commerce Clause.

Act No. 590 of 1990, amending S.C. Code Ann. Section 44-56-59 and Section 44-56-60(a), and E.O. No. 89-25, the "quota" provisions, put inequitable limits on

the amount of hazardous waste that can be disposed of in South Carolina. *See HWTC I*, 766 F.Supp. at 437-48. As proof of its discriminatory purpose, S.C. Code Ann. Section 44-56-59 provides:

> *(A) The General Assembly finds:*
>
> (1) The existing commercial land disposal facility in South Carolina [Pinewood] and available capacity in this State generally are limited resources;
>
> (2) It is essential that the limited waste treatment and disposal capacity of the existing commercial facility [Pinewood] and the State in general be preserved, ready and available to ensure that the needs of South Carolina are met first;
>
> (3) The existing commercial land disposal facility [Pinewood] as well as other hazardous waste treatment and disposal facilities must give preference to hazardous waste generators within the State for treatment and disposal of hazardous materials at licensed facilities in the State;
>
> (4) The General Assembly [Act No. 196] and the Executive branch [E.O. Nos. 89-17 and 89-25] have mandated restrictions on the importation of out-of-state wastes and on the capacity of existing hazardous waste landfills; and
>
> (5) Reducing the amount of hazardous waste shipped to South Carolina commercial facilities will send a message to all states that South Carolina intends to reduce to the greatest extent possible the amount of hazardous waste treated and disposed of in this State.
>
> (B) Based upon these findings the General Assembly declares that:
>
> * * * *
>
> (2) As this State reduces its reliance on landfilling—the amount of hazardous waste being shipped into the State should be reduced and eliminated also.

Accordingly, Section 44-56-60(a)(2) of Act No. 590 subjects Pinewood to a lowered disposal quota of 110,000 tons per year.[4] Of that quota, E.O. No. 89-25 sets aside 54,000 tons for hazardous waste "generated in South Carolina." Thus a substantial portion—45 percent of the overall quota—is reserved for South Carolina waste.

Section 44-56-60(a)(3) of Act No. 590 requires that Pinewood reserve *at least* as much capacity for in-state waste as the facility disposed during the previous twelve months. Thus, if more than 54,000 tons is disposed of by South Carolina, that new amount now serves as a floor for the next 12 months. Pinewood may not, however, accept *any more* out-of-state waste than it accepted during the previous twelve months. Thus, if Pinewood accepted less than 56,000 tons from its out-of-state customers over the previous twelve months, that *lower amount* now serves as a *new ceiling* for the next twelve months. South Carolina generators of waste thus benefit from preferential treatment contained in Section 44-56-60(a)(3) while out-of-state customers fight for access to the shrinking portion of the lowered 110,000 ton total.

Further, under E.O. 89-25 generator-customers located in other states may only utilize up to 35,000 tons of the overall out-of-state quota and not more than 10,000 tons per quarter. E.O. No. 89-25. South Carolina generators, then, are entitled to bring to Pinewood each year over 50% *more* waste than generators from any other one state (54,000 tons as compared with 35,000 tons.)

The final element in this discriminatory program is DHEC Regulation 6199. This regulation contains requirements for the permitting of new or expanded hazardous waste management facilities, including a "demonstration of need" for the new or expanded facility. Plaintiff does

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[4] From July 1, 1990 to July 1, 1991, the capacity limit was 120,000 tons. After July 1, 1991, the 110,000 limit was to go into effect, except for this court's preliminary injunction.

not challenge this regulation in its entirety. Instead, plaintiff only seeks to declare invalid that portion which prohibits an applicant from including out-of-state waste in the demonstration of need: "[f]or the purposes of demonstrating need, Hazardous Waste generated outside the State of South Carolina shall not be included." DHEC Reg. 61-99, III(C). *HWTC I*, 766 F. Supp. at 436.

2. *The State Has Failed To Demonstrate That Any Material Facts Are Genuinely In Dispute*

Defendants argue that material facts remain in dispute which preclude summary judgment and require a trial. As each of the challenged provisions facially discriminates against interstate commerce, however, the State bears the extraordinarily high burden of demonstrating that (1) there is a legitimate local purpose for the discrimination, *and* (2) there are no non-discriminatory alternatives which could serve this purpose. *Wyoming v. Oklahoma*, 112 S. Ct. at 801 (" 'At a minimum such facial discrimination invokes the *strictest scrutiny* of any purported legitimate local purpose and of the absence of nondiscriminatory alternatives' ") (emphasis added), *quoting Hughes*, 441 U.S. at 337; *see also Maine v. Taylor*, 447 U.S. 131, 144 (1986), *quoting Hughes; HWTC II*, 945 F.2d at 790 ("[j]ustifying discrimination is difficult to say the least"). Where, as here, each of the challenged laws "do not regulate evenhandedly but discriminate on their face against out-of-state hazardous waste," *id.* at n. 13, there is a "virtually *per se* rule of invalidity . . . ." *New Energy*, 486 U.S. at 278-79, *quoting Philadelphia v. New Jersey*, 437 U.S. at 624. The burden of overcoming the "virtually *per se*" rule is extraordinarily high, and it has been accomplished only once or twice over the entire history of the Nation.

South Carolina argues that it is entitled to a trial "to exercise its right to adduce evidence in justification of the purpose and basis for its challenged laws." (Memoran-

dum in Opposition at 5). It is the State's position that this Court may not enter summary judgment simply because the Fourth Circuit did not resolve the matter "on the merits" at the preliminary injunction stage. *HWTC II*, 945 F.2d at 789 n. 11.

But this case is no longer at the preliminary injunction stage. In declining, "to decide the case on the merits at the early prelimianry injunction stage," *id.*, the Fourth Circuit property was drawing a distinction between a preliminary injunction motion and a decision on the merits. The present motion is for summary judgment, disposition of which is every bit an adjudication on the merits as a trial.

In particlular, at the summary judgment stage, unlike the preliminary injunction stage, it is not sufficient for South Carolina to simply assert an "intention to produce evidence" at some future time. Rather, the time is now for the State to come forward with actual evidence to carry its burden under "strict scrutiny" and defeat summary judgment. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. at 256 ("Rule 56(e) itself provides that a party opposing a properly supported motion for summary judgment may not rest upon mere allegation or denials of his pleading, but must set forth specific facts showing that there is a genuine issue for trial"). This is particularly true where, as here, it must submit enough evidence to overcome the heavy burden of the virtual *per se* rule of invalidity. *See generally Metuskits Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574 (1986); *Celotex Corp. v. Catrett*, 477 U.S. at 322, 323 ("[t]he moving party is 'entitled to a judgment as a matter of law' because the nonmoving party has failed to make a sufficient showing on an essential element of her case with respect to which she has the burden of proof").

Thus the State is obligated to demonstrate that there is a material fact genuinely in dispute. Mere incantations will not suffice at this stage of the litigation. Nonetheless

incantations are all the State has provided on the essential issue: why discrimination against interstate commerce is necessary to achieve the State's allegedly legitimate purposes. In particular, South Carolina purports to list in its Memorandum in Opposition to Motion for Summary Judgment "factual matters" that "must be addressed." (Memorandum in Opposition at 9.) All of the factual issues listed in the Memorandum in Opposition and in the State's Statement of Material Facts, however, either (1) are undisputed at this stage (*i.e.*, the State's presumably legitimate purpose, which Plaintiff concedes for purposes of this motion only); (2) are irrelevant to the constitutional issues at hand; or (3) raise questions of law rather than questions of fact.

Assuming arguendo that the State possesses legitimate local purposes for placing certain restrictions on hazardous waste, in order to prevail the State must demonstrate what those goals cannot be achieved without facially violating the commerce clause: "[W]hatever [a state's] ultimate purpose, it may not be accomplished by discriminating against articles of commerce coming from outside the State *unless there is some reason, apart from their origin, to treat them differently.*" *Philadelphia v. New Jersey*, 437 U.S. at 627 (emphasis added); *see also Wyoming v. Oklahoma*, 112 S.Ct. at 800 (discriminatory laws "will be struck down unless the discrimination is demonstrably justified by a valid factor unrelated to economic protectionism") (citations omitted). The fatal flaw in South Carolina's program is that the State has failed even to suggest that it has some basis—other than state of origin —for discriminating against out-of-state waste. In fact, that is the reason for the discrimination. Thus, the State cannot justify such unconstitutional activity under any set of alleged facts.

Certainly Defendants' Statement of Material Facts does contain certain incantations regarding alternatives—"The South Carolina laws reflect the unavailability of neutral

alternatives to achieving the State's legitimate purposes in the pertinent circumstances" (Statement of Material Facts at 2); "The failure of [EPA] and other States to license new or additional commercial land disposal capacity has severely restricted the availability of neutral alternatives for achieving the State's legitimate purposes" (*Id. at 3*). Nowhere in the record, however, is there evidence to support the assertion that neutral alternatives are not available.

Indeed, nowhere in the record has South Carolina argued that hazardous waste from out-of-state is *any different* from hazardous waste generated in-state. As noted by this Court and the Fourth Circuit at the preliminary injunction stage, there is no difference: "[h]azardous wastes generated out-of-state pose no more threat to human health and the environment than hazardous waste generated in South Carolina." *HWTC I*, 766 F. Supp. at 441-42, *quoted in HWTC II*, 945 F.2d at 788. In the absence of a *bona fide* distinction, any effort to discriminate against out-of-state waste solely because it is from out-of-state customers must fail. *See Philadelphia v. New Jersey*, 437 U.S. at 629 (because "there is no basis to distinguish out-of-state waste from domestic waste . . . . [the state's] legislative effort is clearly impermissible under the Commerce Clause . . . .").

The State has not presented any evidence to show the absence of nondiscriminatory alternatives. Although South Carolina has not precisely articulated its purposes, there appear to be several alleged concerns, all of which can be satisfied through nondiscriminatory means.

First, South Carolina mentions its concern for the "health, safety and welfare of its citizens." However, as this Court expressly found (and the Fourth Circuit affirmed), "[h]azardous wastes generated out-of-state pose no more threat to human health and the environment than hazardous wastes generated in South Carolina." HWTC I, 766 F. Supp. at 441-42, *quoted in HWTC II*,

945 F.2d at 788. Accordingly, to the extent the State deems the existing comprehensive federal and State regulatory regimes insufficient to protect public health and safety, the State's interest can be served by *nondiscriminatory* hazardous waste management regulations that are applicable to all waste treated and disposed of within South Carolina. *See Philadelphia v. New Jersey*, 437 U.S. at 629; *accord New Energy*, 486 U.S. at 279.

Second, South Carolina also is concerned with preserving disposal capacity. As the Fourth Circuit held, however, it is impermissible for a state to "accord its own inhabitants a preferred right of access over consumers in other States to natural resources located within its borders." *Philadelphia v. New Jersey*, 437 U.S. at 627; *accord New England Power Ct. v. New Hampshire*, 455 U.S. 331, 338 (1982); *cited in HWTC II*, 945 F.2d at 792 ("South Carolina has little inherent right to use capacity located within its borders solely for waste generated within its borders"). The Commerce Clause thus bars any attempt to "conserve" hazardous waste capacity through discriminatory laws. If South Carolina is truly interested in preserving its in-state capacity, that interest would be served by the *bona fide* evenhanded regulations that apply to in-state and out-of-state waste generators. *See HWTC II*, 945 F.2d at 792 ("South Carolina may preserve the capacity by limiting total disposal and treatment within the state without reference to whether in-state or out-of-state waste is actually involved") (Footnote omitted). Moreover, the Supreme Court recently rejected the argument that protectionist and discriminatory measures are necessary "as landfill space diminishes and environmental cleanup costs escalate. . . ." *Carbone*, 114 S. Ct. at 1683. As the Court held in *Carbone*, there has never been a showing "that the unobstructed flow of interstate commerce itself is unable to solve the local problems" which face all landfills around the country. *Id.*

Third, South Carolina makes mention of vague "transportation risks," again without distinguishing between

wastes generated in-state and those generated out-of-state. There is no evidence that any of the challenged South Carolina laws even address this purported concern. However, even if South Carolina were interested in seeking to minimize the risks associated with transportation of hazardous waste, there would be several nondiscriminatory methods of addressing that interest. For example, South Carolina could increase the stringency of its regulations on an evenhanded basis, effectively addressing the State's putative transportation concerns by not exempting South Carolina waste or waste that is imported through South Carolina. With alternatives available to it, South Carolina cannot force *only* interstate commerce to bear the burden of its purported concerns.

Finally, it appears to be South Carolina's perception that certain other state's are not bearing their "fair share" of hazardous waste treatment and disposal. It thus has tried to influence the public policy of *other* states to compel them to take action. Suffice it to say that punishing other states is not a legitimate purpose under the Commerce Clause. *See HWTC II*, 945 F.2d at 791 (South Carolina does not have the authority "to punish certain hazardous waste generators merely because they reside in states that South Carolina concludes have not fulfilled obligations under CERCLA § 104(e)(9)"). Only Congress has the responsibility and power under the Constitution to impose national policy on individual states. Indeed, for South Carolina to try to impose its will on its neighbors is nothing more than one state making economic warfare on another of its sister states.

As for its purportedly legitimate local purpose, South Carolina asserts a range of general justifications. (See Statement of Material Facts ("South Carolina has legitimate purposes in protecting the health, safety and welfare of its citizens"); ("South Carolina has a legitimate public purpose in taking actions to reduce reliance upon land disposal of hazardous waste"); ("South Carolina has

a legitimate public purpose in taking measures to minimize the transportation of hazardous waste in the State"); ("South Carolina has a legitimate public purpose in taking measures to minimize the disposal of hazardous waste in the State"); ("South Carolina has a legitimate public purpose in carefully regulating the siting of new disposal facilities")).

South Carolina's emphasis on this "purpose," however, misses the point entirely. The general purpose of such laws are largely irrelevant when facial or substantial discrimination is involved. *See Phildelphia v. New Jersey*, 437 U.S. at 626 ("[t]his dispute about ultimate legislative purpose need not be resolved, because its resolution would not be relevant to the constitutional issues to be decided in this case"). Thus, it is "the discrimination [that must be] demonstrably justified by a valid factor unrelated to economic protectionism." *New Energy*, 486 U.S. at 274 (citation omitted). Every time the State grants a preference to in-state waste—by allowing that waste to be disposed in the State, or setting differential quotas, or barring consideration of out-of-state market needs and customers in determining whether a facility may be built or expanded—it is engaged in a form of protectionism the Constitution forbids by granting benefits to its citizens and businesses while denying them to those of other states. A state cannot seek to achieve a "presumably legitimate goal" by " 'the illegitimate means of isolating the State from the national economy.' " *Wyoming v. Oklahoma*, 112 S. Ct. at 361, *quoting Philadelphia v. New Jersey*, 437 U.S. at 627. In other words, even if a state demonstrates a legitimate *purpose* for its laws, those are impermissible if that purpose is accomplished by discriminating *solely* on the basis of origin. Thus, the Supreme Court in *Philadelphia v. New Jersey* found the State's salutary motives irrelevant, stating:

> [I]t does not matter whether the ultimate aim of [the law] is to reduce the waste disposal costs of

> [the State's] residents or to save remaining open lands from pollution, for we assume [the State] has every right to protect its residents' pocketbooks as well as their environment. . . . But whatever [the State's] ultimate purpose, it may not be accomplished by discriminating against articles of commerce coming from outside the State unless there is some reason, apart from their origin, to treat them differently.

437 U.S. at 626-27.

In addition, while it is evident from the alternatives South Carolina chose not to pursue that there are indeed nondiscriminatory alternatives, a close look at the program South Carolina *did* put into place reveals that the actual purpose of the program was to discriminate. In Act No. 590, Section 44-56-59(A)(1) reflects the State's clear and unmistakable efforts to discriminate by voicing concern about "limited resources" for disposal of hazardous waste. The next provision references South Carolina's demand that "the needs of South Carolina are met first" and that disposal facilities in the State must "give preference to hazardous waste generators within the State." *Id.* at (A)(2), (3). In addition, the two executive orders contain "whereas" clauses rife with indicia of the State's true purpose.

B. *Conclusions of Law*

South Carolina is not the only state that has recently discriminated against the interstate waste services market. *See Philadelphia v. New Jersey*, 437 U.S. 617 (1978); *Chemical Waste Management, Inc. v. Hunt*, 112 S.Ct. 2089 (1992); *Fort Gratiot Sanitary Landfill, Inc. v. Michigan Dep't of Natural Resources*, 112 S.Ct. 2019 (1992); *C&A Carbone, Inc. v. Town of Clarkstown, New York*, 114 S.Ct. 1677 (1994); *Oregon Waste Systems, Inc. v. Dep't of Environmental Quality*, 114 S.Ct. 1345 (1994). *National Solid Waste Management v. Alabama Dep't of Env't*, 910 F.2d 713 (11th Cir. 1990), *cert.*

denied, 111 S.Ct. 2808 (1991). As the Fourth Circuit explained, these attempts to discriminate must fail:

> Perhaps most importantly, the effect of every state designing particular limits and bars for out-of-state waste could be catastrophic. Indeed, such treatment of hazardous waste—in essence, ensured nontreatment of some hazardous waste—might destroy not only the theoretical principle of a national economic union, but contains the real potential to destroy land, if not also persons, within the union.

HWTC II, 945 F.2d at 792 (citation omitted).

If South Carolina were entitled to enforce this program, *every state* could act similarly. The result would be states making economic war on other states in connection with the policies those states choose to pursue for hazardous waste treatment and disposal:

> The practical effect of the [discriminatory] statute must be evaluated not only by considering the consequences of the statute itself, but also considering how the challenged statute may interact with the legitimate regulatory regimes of other states and what effect would arise if not one, but many or every state enacted similar legislation.

Healy v. The Beer Institute, 491 U.S. at 336.

Thus, the constituent parts of South Carolina's program are unconstitutional, because they discriminate against out-of-state interests. Further, because those parts work together to compose an overall discriminatory program the entire program is unconstitutional.

Defendant's essentially agree that the blacklisting laws are invalid. They impose an embargo on *any waste* from generators in certain states. This is exactly the sort of discrimination the commerce clause prohibits:

> South Carolina's Act, No. 196 seems to punish certain hazardous waste generators merely because they

> reside in states that South Carolina concludes have not fulfilled obligations under CERCLA 104(c)(9). But South Carolina does not appear to have been empowered to place penalties on businesses in such states. . . . And its seems unlikely that South Carolina can penalize its own citizens by prohibiting them from participating in interstate commerce with other states' citizens simply because that state has not met its obligations under CERCLA 104(c)(9). The Commerce Clause protects those "engaged in interstate commerce."

HWTC II, 945 F.2d at 791-2 (other citations omitted). Thus, Section 9 of Act No. 196, amending S.C. Code Ann. Section 44-56-130, must be enjoined. In addition, Section 5 of Act No. 196, which requires that preference be given to in-state generators, must also be enjoined. S.C. Code Ann. 44-56-205.

Similarly, all of the operative language of Executive Order No. 89-17 must be permanently enjoined. These provisions mirror Act No. 196 in blacklisting hazardous waste from certain other states and granting a preference for in-state waste.[5]

The quota laws are also invalid. They systematically discriminate against out-of-state businesses by allowing in-state generators to dispose of significantly more hazardous waste than out-of-state generators. Act No. 590 is thus invalid in its entirety. Defendants assert that the so-called "neutral cap" on disposal in Act No. 590 (S.C. Code Ann. 44-56-60(a)(2)) can be "divorced" from the rest of the State's discriminatory program even if the other discriminatory provisions were invalid. Defendants cite

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[5] Plaintiff does not object to the Court's refraining from permanently enjoining the "whereas" sections of E.O. 89-25 and E.O. 89-17, as these do not contain any operative language. Therefore, although these sections do indicate that the operative sections were designed in toto to discriminate, this Court need not enjoin them *per se*.

the Fourth Circuit's *dictum* that, with regard to the preliminary injunction, "South Carolina may preserve the capacity by limiting total disposal and treatment within the state *without reference* to whether in-state or out-of-state waste is actually involved." *HWTC II*, 945 F.2d at 792. As shown above, however, the so-called neutral cap on disposal is set forth in a statute which expressly references discrimination, both in the statute itself and in its references to the blacklisting statute and executive order. *See* Act No. 598, Section 1, amending S.C. Code Ann. 44-56-59, at (A)(4). On that basis, this cap provision cannot be upheld in accord with the Fourth Circuit's mandate. Moreover, the Supreme Court recently held that a discriminatory program cannot be pursued into its otherwise valid but constituent parts. *West Lynn Creamery, Inc. v. Town of Clarkstown, New York*, 114 S.Ct. 2205 (1994). In *West Lynn*, Massachusetts sought to protect state dairy farming from interstate competition. To accomplish this objective, Massachusetts constructed a two-part ["]pricing order" program consisting of a cash/credit subsidy for state farmers and an "even-handed" tax on all dairy producers selling in the state, regardless of the producer's domicile. Analyzed separately, each of the Massachusetts provisions would likely have survived Constitutional challenge, a point the Supreme Court made clear. *Id.* at 2214. Operating together as they did, however, the Court concluded the State had created an overall discriminatory program that could not withstand Commerce Clause scrutiny:

> [Massachusetts] errs in assuming that the constiutionality of the pricing order follows logically from the constitutionality of its component parts. By enjoining a tax and a subsidy, Massachusetts has created a program more dangerous to interstate commerce than either part alone. Nondiscriminatory measures, like the evenhanded tax at issue here, are generally upheld, in spite of any adverse effects on interstate

> commerce, in part because "[*t*]*he existence of major in state interests adversely affected . . . is a powerful safeguard against legislative abuse. . . .*" However, when a nondiscriminatory tax is coupled with a subsidy to one of the groups hurt by the tax, a *state's political processes can no longer be relied upon* to prevent legislative abuse, because one of the in-state interests which would otherwise lobby against the tax *has been modified by the subsidy.*
>
> * * *
>
> Respondent's argument would require us to analyze separately two parts of an integrated regulation, but we cannot divorce the premium payments from the use to which the payments are put. It is the entire program—not just the contributions to the fund or the distributions from that fund—that *simultaneously burdens interstate commerce and discriminates in favor of local producers.* The choice of constitutional means—nondiscriminatory tax and local subsidy—cannot guarantee the constitutionality of the program as a whole.

Id. at 2214-2215 (citations and footnote omitted). Thus, in *West Lynn Creamery,* the Court struck down all components of the State's discriminatory program, including the so-called neutral tax at issue there.

Similarly, Act No. 590 is invalid in its entirety, including the so-called neutral caps on disposal. Under *West Lynn Creamery*, it is not appropriate to assume that the South Carolina legislature would have enacted the (reduced) 110,000 ton cap in Section 44-56-60(a)(2) *without* the other discriminatory provisions, which reserve substantial disposal capacity for South Carolina generated waste (i.e., 54,000 tons, or 50% more than any other state). The disposal cap was not enacted in a vacuum. To the contrary, in-state generators are *not* adversely effected by the quotas because they received a further benefit at the expense of out-of-state generators. Thus in-state

generators could not and did not serve as a "powerful safeguard against legislative abuse." *Id.*

Finally, Section III(C) of DHEC Regulation 61-99 must be declared invalid and permanently enjoined. It is certainly within DHEC's authority to make certain restrictions with respect to the permitting of new and expanded hazardous waste facilities under RCRA. It is simply beyond the agency's authority, however, to create discriminatory restrictions which consider "in-state needs" only to the exclusion of the needs of *all* the customers who bring waste into South Carolina. It is difficult to conceive of a more obvious effort to hoard the economic resources of a state and to isolate that state from interstate commerce. The Fourth Circuit itself acknowledged the unconstitutionality of this provision, remanding not on the merits of its invalidity, but only on the "balance of hardships" for the issuance of a preliminary injunction. The Fourth Circuit noted that Plaintiff "appears to have a substantial argument that Regulation 61-99 is unconstitutional," *HWTC II*, 945 F.2d at 788, because it:

> . . . appears to be an attempt to *block South Carolina from the nationwide problem. On its face, Regulation 61-99 appears not to regulate evenhandedly.* It permits South Carolina to refuse to allow new construction if all of its waste can be disposed of by exportations. The "practical effect," *Healy*, 491 U.S. at 332, 109 S. Ct. at 2497, *of the regulation may be to favor in-state interests over out-of-state interests.*

HWTC II, 945 F.2d at 791 n. 14 (emphasis added).

South Carolina has a range of administrative, legislative and cooperative remedies available to ameliorate its concerns regarding how other states are dealing with hazardous waste issues. *See generally South Carolina v. Reilly, Admin. of EPA*, No. 91-3090 (D.D.C. filed Nov. 25, 1991) (complaint that Court prevent EPA "from releasing or earmarking federal hazardous waste cleanup funds

under CERCLA to states such as North Carolina whose failure to meet certain statutory conditions renders them ineligible for the funds"). However, South Carolina cannot solve its perceived problem through a program which violates the Commerce Clause.

IV. CONCLUSION

For the foregoing reasons, it is hereby ORDERED.

1. Section 5 and 9 of Act No. 196 of 1989, amending S.C. Code Ann. Section 44-56-205 and Section 44-56-130, are declared invalid and are permanently enjoined;

2. Executive Order No. 89-17, from the words "Now therefore" onward is declared invalid and is permanently enjoined;

3. Act No. 598 of 1990, amending S.C. Code Ann. Section 44-56-59 and S.C. Code Ann. Section 44-56-60 is declared invalid and is permanently enjoined;

4. Executive Order No. 89-25, from the words "Now therefore" onward is declared invalid and is permanently enjoined; and

5. South Carolina Department of Health and Environmental Control Regulation 61-99(III)(C) is declared invalid and is permanently enjoined.

IT IS SO ORDERED.

/s/ Matthew J. Perry
MATTHEW J. PERRY
United States District Judge

Columbia, South Carolina,

April 13, 1995.

APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 91-2317

HAZARDOUS WASTE TREATMENT COUNCIL,
on behalf of itself and its members,
Plaintiff-Appellee,

v.

STATE OF SOUTH CAROLINA; CARROLL A. CAMPBELL, JR., Governor of the State of South Carolina; COMMISSIONER, SOUTH CAROLINA DEPARTMENT OF HEALTH AND ENVIRONMENTAL CONTROL; SOUTH CAROLINA DEPARTMENT OF HEALTH AND ENVIRONMENTAL CONTROL; SOUTH CAROLINA BOARD OF HEALTH AND ENVIRONMENTAL CONTROL,
Defendants-Appellants.

UNITED STATES OF AMERICA,
Amicus Curiae.

Appeal from the United States District Court
for the District of South Carolina, at Columbia
Matthew J. Perry, Jr., District Judge
(CA-90-1402-3-0)

Argued: May 6, 1991
Decided: September 20, 1991

Before MURNAGHAN and SPROUSE, Circuit Judges, and MURRAY, Senior United States District Judge for the District of Maryland, sitting by designation.

OPINION

MURNAGHAN, Circuit Judge:

The case before us arises on appeal from a preliminary injunction granted to Hazardous Waste Treatment Council ("HWTC")[1] which enjoins South Carolina from enforcing, applying, or attempting to apply portions of two state executive orders, two state statutes, and one regulation, all relating to hazardous waste management. HWTC's contention, seeking declarative and injunctive relief, that the Commerce Clause renders parts of the executive orders and statutes unconstitutional, permitting it to operate free from the constraint of such parts, presents a grave and serious question and we therefore affirm the district court's grant of a preliminary injunction to such an extent. We remand, however, to permit the district court to modify its order to clarify that it neither enjoined aspects of the legislation not implicated by the Commerce Clause argument nor, on the merits, declared the enjoined legislation invalid by reason of the Commerce Clause. In addition, we remand the preliminary injunction inquiry relating to the challenged state regulation to allow the district court to balance the hardships to the parties.

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[1] HWTC is a national association of licensed commercial firms which treat, recycle, and dispose of hazardous waste. Three HWTC members are located within South Carolina.

I.

An amalgam of federal acts, federal regulations, state statutes, state regulations, and court opinions, all addressing the hazardous waste problem, comprise the background of the instant appeal. At the preliminary injunction stage, where the merits have not yet been addressed, we need only sketch the broad outlines that enable us to reach a decision. We first touch upon the federal programs that comprise the background to the appeal. We then explain the South Carolina legislation challenged in the appeal. As our colleagues on the Eleventh Circuit recently wrote, "our job is not to make policy, but to interpret the federal legislation and regulations to determine Congress's intent . . . . We recognize that serious problems associated with hazardous waste management plague our nation; but whatever our own views may be about the effectiveness of what Congress or Alabama has done, we can only apply the law." *Nat'l Solid Wastes Management Ass'n v. Alabama Dep't of Envtl. Management*, 910 F.2d 713, 715-16 (11th Cir. 1990), *as modified upon denial of reh'g*, 924 F.2d 1001 (11th Cir. 1991), *cert. denied*, —— U.S. ——, 59 U.S.L.W. 3783 (1991).

A. *Federal Laws and Regulations*

Fifteen years ago, Congress passed the Resource Conservation and Recovery Act of 1976 ("RCRA"), as amended, 42 U.S.C. §§ 6901-92k. RCRA establishes a national program for hazardous waste management administered by the Environmental Protection Agency ("EPA"). RCRA encompasses most aspects of hazardous waste management, including identification of waste, standards for generators, transporters, and operators of treatment, storage, and disposal facilities, and procedures for permits. Section 3006(b) of RCRA allows a state to implement its own program "in lieu of the federal program." 42 U.S.C. § 6926(b). No aspect of RCRA is to be "construed to

prohibit any State . . . from imposing any requirements, including those for site selection, which are more stringent than those imposed by such regulations." 42 U.S.C. § 6929. A state's program, however, must be "equivalent to" and "consistent with" the federal program and must provides "adequate enforcement of compliance." 42 U.S.C. § 6926(b). Such a state program, authorized by EPA, "shall have the same force and effect" as action taken by EPA. 42 U.S.C. § 6926(d).

RCRA has been explained and implemented by numerous federal regulations. Of particular concern in the present case, is 40 C.F.R. § 271.4, which implements RCRA § 3006, 42 U.S.C. § 6926:

> § 271.4 Consistency
>
> To obtain approval, a State program must be consistent with the Federal program and State programs applicable in other States and in particular must comply with the provisions below. For purposes of this section the phrase "State programs applicable in other States" refers only to those State hazardous waste programs which have received final authorization under this part.
>
> (a) Any aspect of the State program which unreasonably restricts, impedes, or operates as a ban on the free movement across the State border of hazardous wastes from or to other States for treatment, storage, or disposal at facilities authorized to operate under the Federal or an approved State program shall be deemed inconsistent.
>
> (b) Any aspect of State law or of the State program which has no basis in human health or environmental protection and which acts as a prohibition on the treatment, storage or disposal of hazardous waste in the State may be deemed inconsistent.

> (c) If the State manifest system does not meet the requirements of this part, the State program shall be deemed inconsistent.

40 C.F.R. § 271.4.

RCRA attempts to address hazardous waste before it becomes a problem. Congress enacted other federal statutes to deal with the need to cleanup improperly or illegally disposed waste. In 1980, the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA"), 42 U.S. §§ 9601-75, created a fund—*i.e.*, a "Superfund"—of federal money available for state cleanup efforts. Several years later, when it became apparent that local community actions were resulting in little construction or expansion of hazardous waste management facilities, Congress enacted amendments to CERCLA § 104(c), the Superfund Amendments and Reauthorization Act of 1986 ("SARA"), Pub. L. No. 99-499, 100 Stat. 1613. Of particular importance to the instant appeal, amendment § 104(k) which became CERCLA § 104(c)(9) provided:

> (9) Siting
>
> Effective 3 years after October 17, 1986, the President shall not provide any remedial actions pursuant to this section unless the State in which the release occurs first enters into a contract or cooperative agreement with the President providing assurances deemed adequate by the President that the State will assure the availability of hazardous waste treatment or disposal facilities which—
>
> (A) have adequate capacity for the destruction, treatment, or secure disposition of all hazardous wastes that are reasonably expected to be generated within the State during the 20-year period following the date of such contract or cooperative agree-

> ment and to be disposed of, treated, or destroyed,
>
> (B) are within the State or outside the State in accordance with an interstate agreement or regional agreement or authority,
>
> (C) are acceptable to the President, and
>
> (D) are in compliance with the requirements of subtitle C of the Solid Waste Disposal Act [42 U.S.C.A. § 6921 et seq.]

42 U.S.C. § 9604(c)(9). Section 104(c)(9) has been construed to require each state to present a Capacity Assurance Plan ("CAP") to EPA.

EPA's Office of Solid Waste and Emergency Response ("OSWER") issued two directives explaining the CAPs. *See* OSWER Directive 9010.00a (Oct. 16, 1989) ("Agency Review of SARA Capacity Assurance Plans"); OSWER Directive 9010.00 (December 1988) ("Assurance of Hazardous Waste Capacity: Guidance to State Officials"). The directives emphasize that waste reduction is the preferred method of addressing hazardous waste problems. *See* OSWER Directive 9010.00a, at 1-2. However, the directives also explain that SARA was enacted to solve the "NIMBY"—"not in my backyard"—problems that arose because of political pressure and public opposition:

> Congress believed that some states were not moving aggressively to create facilities needed to manage hazardous wastes and that this inaction could lead to the creation of additional Superfund sites, even though some wastes might be managed at facilities available in other states. This problem would be exacerbated if the costs of interstate waste management were to rise or if states were to take actions that directly or indirectly impeded interstate waste

> movement. Although any hazardous waste management facilities created would be regulated in an environmentally safe manner under RCRA, existing statutory and regulatory authorities did not adequately address the need to develop and to assure access to such facilities within and among the states.

OSWER Directive 9010.00, at 2; *see Nat'l Solid Wastes*, 910 F.2d at 717. Thus, CERCLA § 104(c)(9) envisions the import and export of hazardous waste to avoid future Superfund cleanup sites along with the construction of new facilities.

As the directives note, "Planning for twenty years of waste generation is not a simple task, particularly when the states will not, in most cases, own the wastes or directly control their generation or disposition." OSWER Directive 9010.00, at 6. Consequently, CERCLA § 104 (c)(9) conditions the receipt of Superfund remedial funds on a state's presentation of a CAP which "assures" twenty-year capacity for in-state generated waste either at in-state facilities or at out-of-state facilities pursuant to an interstate or regional agreement. At least on the materials available to us at the preliminary injunction stage, CERCLA § 104(c)(9) does not appear to contemplate that hazardous waste actually be disposed of according to the CAP. For example, the OSWER directives imply that, for the purposes of the CAP, a state's in-state capacity will be reduced by imported hazardous waste only to the extent that an interstate or regional agreement exists. Hence, it appears that even if fifty percent of South Carolina facilities' capacity actually is used to treat out-of-state waste, unless that percentage occurred pursuant to an interstate or regional agreement, South Carolina can obtain EPA approval for a CAP that allocates the very same capacity to in-state generated waste. The CAP is intended to ensure that, *in theory*, no future cleanup will be required because sufficient sites will exist somewhere to treat and dispose of the waste.

Moreover, CERCLA § 104(c)(9) does not appear to fine a noncompliant state, does not prohibit private parties from importing or exporting hazardous waste in the absence of an interstate or regional agreement, does not establish equal distribution requirements for hazardous waste facilities among the states, and does not introduce percentage limits on in-state and out-of-state waste. The only penalty faced by a state that refuses to comply with CERCLA § 104(c)(9) is disqualification for Superfund money.

B. *South Carolina's Legislation*

In 1985, EPA gave South Carolina RCRA authorization to operate its program.[2] In 1989, South Carolina began to execute the two state statutes, two executive orders, and one state regulation that are the subject of the instant appeal.

1) Act No. 196 of 1989, enacted June 14, 1989, requires that South Carolina hazardous waste treatment and disposal facilities give preference to in-state generators,[3]

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[2] At that time EPA approved the program despite an argument that the program was "inconsistent." South Carolina's program contained a fee schedule that placed a higher fee for disposal of waste generated outside the state than for that domestically generated. EPA concluded that the statute did not render the program "inconsistent" under RCRA. 50 Fed. Reg. 46437 (1985). EPA explained that it "intended 'unreasonable restrictions or impediments' to render State programs inconsistent," 50 Fed. Reg. 46438 (1985), and the fee differential was not unreasonable. As far as we know, the South Carolina fee differential has not been challenged under the Commerce Clause and is not challenged in this case. *Cf. Nat'l Solid Waste Management Ass'n v. Voinovich*, 763 F. Supp. 244 (S.D. Ohio 1991) (finding unconstitutional a state statute levying higher taxes on out-of-state solid wastes).

[3] "All hazardous waste treatment and disposal facilities in South Carolina shall give preference to hazardous waste generators within the State of South Carolina for treatment and disposal of hazardous materials at licensed facilities in the State." S.C. Code Ann. § 44-56-205; Act No. 196 § 5.

and prohibits "any person who owns or operates a waste treatment facility within this State" from accepting

> any hazardous waste generated in any jurisdiction which prohibits by law the treatment of that hazardous waste within that jurisdiction or which has not entered into an interstate or regional agreement for the safe treatment of hazardous waste pursuant to the federal Comprehensive Environmental Response, Compensation and Liability Act.

S.C. Code Ann. § 44-56-130(4); Act. No. 196 § 9.

Executive Order 89-17 is basically an earlier version of Act No. 196. It provides a mandatory preference for in-state generators and prohibits the acceptance of hazardous waste from out-of-state generators where such disposal is banned.[4]

2) Act No. 590 requires that a permit be obtained before operating a hazardous waste facility. The act limits the amount of hazardous waste that may be disposed of by burial.[5] More waste may be buried upon certification, provided that disposal "is necessary to protect the health and safety of the people of this State" or "at least one hundred ten thousand tons of hazardous waste disposed of by land burial in this State during the twelve-month period was generated in South Carolina." S.C. Code Ann. § 44-56-60(a)(3). In addition, during each period,

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[4] Executive Order 89-17 extends and amends an earlier executive order, 89-03, promulgated on January 19, 1988:

> No person who owns or operates a disposal facility in this State shall accept hazardous waste which is generated in another State and is banned or prohibited for disposal by any statute, regulation or administrative decision of the State.

[5] From July 1, 1990 to July 1, 1991, hazardous waste disposal sites are restricted to one hundred twenty thousand tons of waste per twelve months. After July 1, 1991, the restriction drops to one hundred ten thousand tons.

> a person operating a hazardous waste disposal facility or site shall reserve at least the same capacity to dispose of hazardous waste generated in South Carolina that was disposed of by burial at that facility or site during the previous year . . . . No more hazardous waste from out of state shall be buried in South Carolina than was buried in the previous twelve-month period.

Id.

3) Executive Order 89-25, promulgated on July 6, 1989, requires in-state disposal facilities to reserve "54,000 tons per year of the statutory maximum of 135,000 tons per year for South Carolina generated waste" and to limit the waste from any one state to 35,000 tons, at the rate of 10,000 tons per quarter.

4) South Carolina Department of Health and Environmental Control ("DHEC") Regulation 61-99, effective January 12, 1990, requires "applicants for permits to establish or expand facilities for treatment, storage, or disposal of hazardous waste," Reg. 61-99(I)(B), to demonstate "need." "Need" cannot include hazardous waste generated outside of South Carolina. Reg. 61-99 (III)(C).

In response to an EPA request on July 6, 1989, South Carolina provided a South Carolina Attorney General Opinion that Executive Order 89-17 and Act No. 196 were "consistent" under 40 C.F.R. § 271.4(a). In reaching that decision, the Attorney General concluded that, because the statute appeared constitutional under Commerce Clause analysis, it was "consistent." The Attorney General, however, noted that the portion of Act No. 196 challenged here on appeal raised a "more difficult legal question" under Supreme Court jurisprudence. No response by EPA appears in the record.

Copies of some of the legislation, including Act No. 196 and the two executive orders, were also submitted to

EPA on October 17, 1989 as part of South Carolina's effort to gain approval of its CAP under CERCLA § 104 (c)(9). South Carolina also included a copy of a SARA Capacity Assurance Regional Agreement with Tennessee, Kentucky, and Alabama.[6] With little comment, on May 10, 1990, EPA approved the CAP.

On June 28, 1990, HWTC filed suit against the State of South Carolina, its governor, and certain state agencies, for declaratory and preliminary and permant injunctive relief. HWTC alleged that the statutes, orders, and regulations violated the Commerce Clause, the Privileges and Immunities Clause, the Supremacy Clause, and 42 U.S.C. § 1983. In addition, HWTC filed a motion for preliminary injunction. South Carolina moved for partial dismissal of all but the Commerce Clause claims and argued abstention as a basis for dismissal of the Commerce Clause claims with respect to Regulation 61-99.[7]

On September 27, 1990, the district court heard the motions for preliminary injunction and partial dismissal based on affidavits and documentary materials. On December 18, 1990, the district court issued a temporary restraining order to stop South Carolina from prohibiting hazardous waste from North Carolina.[8]

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[6] North Carolina joined the Agreement; however, that state's participation depended on the construction or permitting of certain new facilities.

[7] Sierra Club, Energy Research Foundation, Citizens for Clear Air and Water, Environmentalists, Inc., and Citizens Asking for a Safe Environment, Inc. (collectively "Sierra Club") filed a motion to intervene as party defendants with respect to the argument over Regulation 61-99. The district court denied the motion on January 15, 1991. Sierra Club's appeal to this court is No. 91-2331.

[8] The proceedings giving rise to the temporary restraining order illustrate the complexities of South Carolina's and HWTC's positions. North Carolina had been a party to the regional agreement provided it created additional hazardous waste facilities, including undertaking the permitting for an incinerator by December 31, 1990. In mid-December 1990, North Carolina's Council of State

On January 11, 1991, the district court issued a preliminary injunction against South Carolina and denied South Carolina's motion for partial dismissal.

II.

In this circuit, the criteria to be examined when confronting a motion for a preliminary injunction and the appellate review of a district court's grant of a preliminary injunction are well settled. A grant of preliminary injunction is " 'discretionary with the district court and may not be set aside on appeal unless an abuse of discretion is shown.' " *Rum Creek Coal Sales, Inc. v. Caperton*, 926 F.2d 353, 358 (4th Cir. 1991) (citation omitted). The *Blackwelder* standard governs the imposition of a preliminary injunction. *See Blackwelder Furniture Co. v. Seilig Mfg. Co., Inc.*, 550 F.2d 189 (4th Cir. 1977). Remembering that minimization of change in the *status quo* and not decision on the merits of the controversy is the objective, a court considers four factors:

> (1) the likelihood of irreparable harm to the plaintiff if the preliminary injunction is denied,
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> (2) the likelihood of harm to the defendant if the requested relief is granted,
>
> (3) the likelihood that the plaintiff will succeed on the merits, and

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apparently rejected the transfer of certain state lands for this purpose. South Carolina's governor promptly sent a letter advising the governor of North Carolina that North Carolina would be automatically eliminated from the regional agreement. Under the legislation at issue in this appeal, South Carolina facilities would be prohibited from accepting hazardous waste from North Carolina.

Both South Carolina and HWTC allegedly have petitioned the EPA to withdraw North Carolina's RCRA authority and eligibility for Superfund money. HWTC apparently petitioned the EPA for withdrawal because of a North Carolina statute, S.B. 114, which was alleged to preclude construction of certain hazardous waste facilities. The EPA, however, denied the request. The District of Columbia Court of Appeals is currently considering HWTC's appeal from the EPA's denial (No. 90-1443).

(4) the public interest.

L.J. By and Through Darr v. Massinga, 838 F.2d 118, 120 (4th Cir. 1988), *cert. denied*, 488 U.S. 1018 (1989). If the balance of the first two factors " 'tips decidedly' in favor of the plaintiff," *Rum Creek Coal*, 926 F.2d at 359 (citation omitted), and " 'the plaintiff has raised questions going to the merits so serious, substantial, difficult and doubtful, as to make them fair ground for litigation and thus for more deliberate investigation,' " *id.* (*quoting Blackwelder*, 550 F.2d at 195), the court shall grant a preliminary injunction.

Some confusion appears as to the scope of the preliminary injunction granted in the instant case. South Carolina claims that the district court's preliminary injunction covered provisions not even arguably unconstitutional under the Commerce Clause. In addition, the state contends that the district court erroneously declared the legislation "invalid." With respect to the latter contention, the district court's memorandum opinion makes clear that it did not intend to declare "invalid" the challenged legislation. The use of the word "invalid" appears to have been a technical mistake and the district court should modify the order by striking the words "which this Court declares are invalid." Order (Jan. 11, 1991), at 2.

We agree with South Carolina that the district court should limit the preliminary injunction to those aspects of the challenged legislation that present Commerce Clause questions. Once again, we believe that the district court's intent was to enjoin only those aspects specifically addressed in the court's memorandum opinion. Specifically, the preliminary injunction properly extends to provisions relating to preference for in-state waste, prohibitions, limits, or other restrictions on the acceptance of certain out-of-state waste, and permitting restrictions referring to out-of-state waste or limiting need to in-state waste.[9]

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[9] The pertinent provisions appear to be (1) Act No. 196, §§ 5 and 9, amending S.C. Code Ann. §§ 44-56-205 and 44-56-130; (2)

On appeal, the parties have focused their energy on the district court's conclusion that HWTC would likely succeed on the merits. However, we first must address the balance of the hardships prong of *Blackwelder*. The district court found that HWTC's members, inside and outside of South Carolina, would be injured by the challenged aspects of the legislation. Not only would the members within the state lose revenue from out-of-state sources but they would be required to chose among out-of-state sources. Similarly, out-of-state members would be required to find, "if possible," other treatment and disposal facilities. We agree with the district court's analysis assessing the likelihood of harm so far as it relates to the statutes and executive orders. They alter the ability of HWTC's members to import or export hazardous waste at existing facilities. The harm to South Carolina is less substantial because, as the district court noted, "[h]azardous wastes generated out of state pose no more threat to human health and the environment than hazardous waste generated in South Carolina."

More troubling, however, is the district court's analysis of Regulation 61-99. Only one sentence was devoted to

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similar provisions in Executive Order 89-17; *i.e.*, any related aspects of the preamble; page 4, fifth full paragraph, first sentence, beginning "no person . . ." to page 5, fourth full paragraph, first sentence, ". . . State."; (3) Executive Order 89-25, any related aspects of the preamble; page 3, seventh paragraph, first sentence, beginning, "hazardous . . . tons."; page 4, first full paragraph; (4) Act No. 590, 1, in specific, § 44-56-59(A), (B)(2), § 2, in specific, § 44-56-60(a)(3)(B), with the exception of the final paragraph, "Certification . . . site."

The district court should modify accordingly the preliminary injunction, thus limiting it. We do not believe that the parties are in disagreement on this issue. If disagreement arises over our *exclusion* of any particular provision, the district court should address it in a manner consistent with our opinion.

Because, as discussed below, we remand the preliminary injunction inquiry with respect to Regulation 61-99, we do not consider here the necessary scope of any possible eventual preliminary injunction of it.

harm caused by Regulation 61-99: "[t]he in state need requirement contained in the permit regulation also has injured the business interests of plaintiff's South Carolina members." "The rationale behind a grant of a preliminary injunction has been explained as preserving the *status quo* so that a court can render a meaningful decision after a trial on the merits." *Rum Creek Coal*, 926 F.2d at 359. If Regulation 61-99 is not enjoined, the district court's analysis does not make clear whether or not HWTC will suffer irreparable harm. Even if Regulation 61-99 turns out to be unconstitutional, any particular member who seeks a permit during the pending litigation may be able to obtain it under the current requirements if, for example, in-state need exists. However, if Regulation 61-99 turns out to be constitutional, South Carolina may be stuck with an unnecessary facility that obtained a permit during the pendency of the litigation. On the other hand, if litigation were to take so long that the absence of a new facility to handle waste, including out-of-state waste, would create irreparable harm, not only to HWTC but to the public, because of the possible creation of additional untreated waste, then the balance might tip the other way on a reapplication for temporary injunctive relief. Thus, although as we note below, HWTC appears to have a substantial argument that Regulation 61-99 is unconstitutional, we cannot uphold the temporary injunction as it relates to Regulation 61-99 in the absence of evidence that the district court engaged in a specific test of the balance of the hardships. We remand to permit the district court to consider the hardships.[10]

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[10] South Carolina argues that the district court erred in refusing to abstain from ruling on Regulation 61-99. We affirm the district court's ruling. We note that because of our ruling in No. 91-2331 the district court should consider whether Sierra Club may intervene in the case, and we have considered Sierra Club's arguments on the issue either as an intervenor or *amicus curiae*. Abstention under *Railroad Comm'n of Texas v. Pullman Co.*, 312 U.S. 496 (1941), was not applicable because the issue of whether parts of Regulation 61-99 violate the Commerce Clause will not be

Nevertheless, because the balance of the first two factors appears to "tip decidedly" in favor of HWTC in the case of the statutes and executive orders, we reexamine HWTC's likelihood of success only to discover whether it has shown " 'grave or serious' questions for litigation." *Rum Creek Coal*, 926 F.2d at 363. As this Circuit has often repeated, " 'We of course venture no opinion as to facts that should be found, nor upon whether and how

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" 'mooted' " or " 'presented in a different posture by a state court determination of pertinent state law.' " *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 814 (1976) (citation omitted). Regulation 61-99(III)(C) prohibits involving out-of-state generation to show "need." The meaning of Regulation 61-99 is not "unsettled." *Virginia Hosp. Ass'n v. Baliles*, 868 F.2d 653, 664 (4th Cir. 1989), *aff'd sub nom. Wilder v. Virginia Hosp. Ass'n*, —— U.S. ——, 110 S.Ct. 2510 (1900). And "questions of state law" will not dispose of the case. *Gordon v. Luksch*, 887 F.2d 496, 497 n.2 (4th Cir. 1989).

Similarly, abstention under *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943), was not appropriate. Although Regulation 61-99 is part of a complex state regulatory scheme, determining the constitutionality of Regulation 61-99 does not present " 'difficult questions of state law bearing on policy problems of substantial public import whose importance transcends the result in the case . . . .' " *New Orleans Pub. Serv., Inc. v. Council of New Orleans*, 491 U.S. 350, 361 (1989) ("*NOPSI*") (citation omitted). Nor will " 'the exercise of federal review of the question . . . be disruptive of state efforts to establish a coherent policy with respect to a matter of substantial public concern.' " *Id.*; *see Gordon*, 887 F.2d at 497 n.2.

Abstention under *Younger v. Harris*, 401 U.S. 37 (1971), applies predominantly to cases involving state criminal proceedings. *See Cinema Blue of Charlotte, Inc. v. Gilchrist*, 887 F.2d 49 (4th Cir. 1989), *cert. denied*, 110 S.Ct. 1479 (1990); *Gordon*, 887 F.2d at 497 n.2. *Younger* abstention may be proper in rare cases involving other state proceedings; however, none of the factors suggested in *NOPSI*, 491 U.S. at 364-73, exist here. Exceptional circumstances commanding abstention not being present, the district judge properly refused to abdicate federal jurisdiction over the constitutional questions. *See NOPSI*, 491 U.S. at 358.

any facts that may be found will invoke the controlling doctrine.' "[11] *Id.* at 367 (citation omitted).

South Carolina, arguing for disposition in its favor, has asserted that RCRA and CERCLA § 104(c)(9) embody a congressional exercise of the commerce power rendering irrelevant dormant Commerce Clause analysis. The state claims that Congress specifically left states free to regulate hazardous waste subject to EPA oversight. Thus, South Carolina contends that EPA's regulation implementing RCRA § 3006 establishes the only standard applicable to the case: whether or not the statutes, orders, and regulation act otherwise as an unreasonable restriction, impediment, or ban on interstate movement of hazardous waste. South Carolina contends that its legislation is reasonable because CERCLA § 104(c)(9)(A) requires that the state provide assurance that it has capacity, either in-state or through regional or interstate agreements, to treat or dispose of all hazardous waste generated in the state for the next twenty years and it can only do so by reserving some capacity for in-state waste. However, that approach's application here is by no means crystal clear.

HWTC argues that the statutes, orders, and regulation violate the Commerce Clause. HWTC contends that Congress' enactment of legislation concerning hazardous waste did not authorize states to engage in actions that would, in the absence of such legislation, burden interstate commerce.

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[11] HWTC has urged us to decide the case on the merits. We decline to do so as facts remain in dispute. *See Rum Creek Coal*, 926 F.2d at 359. For example, we have found confusing the posture of the EPA with respect to state activities considered permissible under 40 C.F.R. § 271.4 and its standards and procedures for withdrawal of state RCRA authority and refusal of Superfund money. In addition, it appears that the complexities inherent in the hazardous waste situation would make perilous any attempt to decide the case on the merits at the early preliminary injunction stage.

The Commerce Clause [12] "directly limits the power of the States to discriminate against interstate commerce." *New Energy Co. of Indiana v. Limbach*, 486 U.S. 269, 273 (1988). The negative or dormant Commerce Clause "prohibits economic protectionism—that is, regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors." *Id.* at 273-74. Thus the Clause is a " 'substantive restriction on permissible state regulation' of interstate commerce." *Dennis v. Higgins*, —— U.S. ——, 111 S.Ct. 865, 870 (1991) (*quoting Hughes v. Oklahoma*, 441 U.S. 322, 326 (1979)).

If the challenged statute "clearly discriminate[s] against interstate commerce," *New Energy Co.*, 486 U.S. at 274, the court must strike it down, "unless the discrimination is demonstrably justified by a valid factor unrelated to economic protectionism." *Id.* at 274. Justifying discrimination is difficult to say the least. The Supreme Court's acceptance of such discrimination has been focused on commerce bearing the threat of death or disease. *See, e.g., Maine v. Taylor*, 477 U.S. 131 (1986) (upholding Maine's prohibition on importing live baitfish because of the potential for destruction of Maine's fisheries); *Clason v. Indiana*, 306 U.S. 439 (1939) (upholding Indiana's prohibition on importing dead animals because of the potential for disease). In general, a " 'virtually *per se* rule of invalidity' " applies. *New Energy Co.*, 486 U.S. at 278-79 (*quoting Philadelphia v. New Jersey*, 437 U.S. 617, 624 (1978)); *Maine*, 477 U.S. at 148. " 'When a state statute directly regulates or discriminates against interstate commerce, or when its effect is to favor in-state economic interests over out-of-state interests, we have generally struck down the statute without further inquiry.' " *Healy v. Beer Institute, Inc.*, 491 U.S. 324, 337

[12] "Congress shall have the Power . . . [t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." U.S. Const., Art. I, § 8, cl. 3.

n.14 (1989) (*quoting Brown-Forman Distillers Corp. v. New York State Liquor Auth.*, 476 U.S. 573, 579 (1986)). If, however, the statute "has only indirect effects on commerce and regulates evenhandedly," *id.*, the statute will be upheld unless the burdens are " 'clearly excessive in relation to the putative local benefits.' " *Maine*, 477 U.S. at 138 (*quoting Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970)).

Congress, of course, may permit the states to engage in practices otherwise unconstitutional under the Commerce Clause. *Maine*, 477 U.S. at 138. Parties seeking to argue that Congress has authorized the otherwise invalid legislation face a heavy burden. The Supreme Court has held that before a federal statute will be so interpreted, "[a]n unambiguous indication of congressional intent is required," *Maine*, 477 U.S. at 139, congressional direction must be "unmistakably clear," *South-Central Timber Development, Inc. v. Wunnicke*, 467 U.S. 82, 91 (1984) or "a clear expression of approval by Congress" must be shown. *Id.* at 92. That requirement is not idly commanded. Without the requirement, " 'the risk that unrepresented interests will be adversely affected by restraints on commerce' " "unacceptably increases." *Maine*, 477 U.S. at 139 (*quoting South Central Timber*, 467 U.S. at 92). Nor may we idly disregard it. "[W]hen Congress has not 'expressly stated its intent and policy' to sustain state legislation from attack under the Commerce Clause, we have no authority to rewrite its legislation based on mere speculation as to what Congress 'probably had in mind.' " *New England Power Co. v. New Hampshire*, 455 U.S. 331, 343 (1982) (citations omitted); *see South Central Timber*, 467 U.S. at 92.

We first consider whether, in the absence of congressional action, the challenged parts of executive orders and statutes may violate the Commerce Clause. The argument, at the early preliminary injunction stage at least, that they do so is by no means devoid of merit. They

appear facially to discriminate against out-of-state hazardous waste.[13] They compel in-state facilities to give preference to in-state waste, to reserve a specific amount of in-state capacity for in-state waste, to limit the acceptance of out-of-state waste to certain amounts, and to bar waste from specific states.

South Carolina has not banned all out-of-state waste but, on full development on the merits, that may prove to be of little relevance. *See Great Atl. & Pac. Tea Co. v. Cottrell*, 424 U.S. 366, 375 (1976); *Nat'l Solid Wastes*, 910 F.2d at 720. South Carolina appears to have attempted "to isolate itself from a problem common to many by erecting a barrier against the movement of interstate trade."[14] *City of Philadelphia v. New Jersey*, 437 U.S. 617, 628 (1978).

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[13] South Carolina has not attempted to argue that hazardous waste is not an object of commerce. The argument would appear untenable. *See Nat'l Solid Wastes*, 910 F.2d at 718-19.

Because the executive orders and statutes do not regulate evenhandedly but discriminate on their face against out-of-state hazardous waste, the analysis used in *Pike* does not apply. *See Healy*, 491 U.S. at 337 n.14. *J. Filiberto Sanitation, Inc. v. State of N.J. Dep't of Envtl. Protection*, 857 F.2d 913 (3d Cir. 1988), cited by South Carolina, applied the *Pike* test to a county plan where the plaintiff failed to show that the plan was protectionist, placing the burden on out-of-state interests. *Id.* at 919-22.

[14] Although we have remanded Regulation 61-99 to the district court, we note that the requirement that private groups seeking to obtain in South Carolina a permit to construct a new hazardous treatment facility must demonstrate "need" where "need" may not include out-of-state need (even that pursuant to a regional or interstate agreement to which South Carolina is a party) and must consider the reduction of in-state need by exportation, appears to be an attempt to block South Carolina from the nationwide problem. On its face, Regulation 61-99 appears not to regulate evenhandedly. It permits South Carolina to refuse to allow new construction if all of its waste can be disposed of by exportation. The "practical effect," *Healy*, 491 U.S. at 352, of the regulation may be to favor in-state interests over out-of-state interests. All in all, however, the issue is too complex and possibly fact-dependent to

Act No. 196 bears a marked resemblance to an Alabama statute recently struck down by the Eleventh Circuit as violative of the Commerce Clause. The Alabama statute barred the acceptance of waste from states that either prohibited in-state disposal or treatment of the waste or had not signed an interstate or regional agreement to which Alabama was a party. *Nat'l Solid Wastes Management v. Alabama Dep't of Env't.*, 970 F.2d 713, 717 (11th Cir. 1990), *as modified upon denial of reh'g*, 924 F.2d 1001 (11th Cir. 1991), *cert. denied*, —— U.S. ——, 59 U.S.L.W. 3783 (1991). South Carolina's statute does not require that South Carolina be a signatory to the required interstate or regional agreement; however, it appears doubtful that the distinction, after full factual development, will prove significant. The Supreme Court has refused to vary "the strength of the bar against economic protectionism according to the size and number of in-state and out-of-state firms affected . . . ." *New Energy Co.*, 486 U.S. at 276.

The rationales advanced for South Carolina's Act No. 196 seem insufficient, if the question were addressed at the preliminary injunction stage, to save it. Unlike many states that have attempted to pass reciprocity provisions, because South Carolina will permit the acceptance of out-of-state waste without regard to South Carolina's *actual* approval as signatory, Act No. 196 does not seem driven by concerns over other states' inferior standards that may jeopardize South Carolina's citizens' health. *See, e.g., Great Atl. & Pac. Tea*, 424 U.S. at 366; *Dean Milk Co. v. Madison*, 340 U.S. 349 (1951) (finding reciprocity provisions unconstitutional despite assertion of health standard rationale) South Carolina also may be unable to present more convincing support for the sort of conservation and preservation argument ultimately found unconstitutional in *Sporhase v. Nebraska*, 458 U.S. 941

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allow determination on the merits at the preliminary injunction stage.

(1982). South Carolina's Act No. 196 seems to punish certain hazardous waste generators merely because they reside in states that South Carolina concludes have not fulfilled obligations under CERCLA § 104(c)(9). But South Carolina does not appear to have been empowered to place penalties on businesses in such states. *See Great Atl. & Pac. Tea,* 424 U.S. at 380 ("Mississippi is not privileged under the Commerce Clause to force its own judgments as to an adequate level of milk sanitation on Louisiana at the pain of an absolute ban on the interstate flow of commerce in milk."). And it seems unlikely that South Carolina can penalize its own citizens by prohibiting them from participating in interstate commerce with other states' citizens simply because that state has not met its obligations under CERCLA § 104(c)(9). The Commerce Clause protects those "engaged in interstate commerce." *Dennis,* 111 S.Ct. at 872. South Carolina's desire to have all states follow federal requirements for Superfund money is understandable, perhaps even laudable. It remains, after full factual development, to be decided whether such desire can be fulfilled at the expense of imparing the interstate commerce rights of individuals.

With respect to the remaining legislation, South Carolina seems unlikely to meet the burden of showing that burying in-state hazardous waste rather than out-of-state waste advances the health and safety of South Carolina citizens. "[T]here is no basis to distinguish out-of-state waste from domestic waste." *City of Philadelphia,* 437 U.S. at 629. South Carolina argues that it should be able to preserve its in-state capacity. The burden, however, "of conserving the State's remaining landfill space" should not fall disporportionately on out-of-state interests. *Id.* at 628. South Carolina has little inherent right to use capacity located within its borders solely for waste generated within its borders. *See New England Power,* 455 U.S. at 338 ("Our cases consistently have held that the Commerce Clause . . . precludes a state from mandating that its residents be given a preferred right of access, over

out-of-state customers, to natural resources located within its borders or to the products derived therefrom."); *City of Philadelphia*, 437 U.S. at 627 ("a State may not accord its own inhabitants a preferred right of access over consumers in other States to natural resources located within its borders"). South Carolina may preserve the capacity by limiting total disposal and treatment within the state without reference to whether in-state or out-of-state waste is actually involved.[15] But in a national economy filled with benefits and burdens, South Carolina may not be permitted to stop the flow of hazardous waste at its time of treatment and disposal at the borders.

Perhaps most importantly, the effect of every state designing particular limits and bars for out-of-state waste could be catastrophic. *See Healy*, 491 U.S. at 339-40. Indeed, such treatment of hazardous waste—in essence, ensured nontreatment of some hazardous waste—might destroy not only the theoretical principle of a national economic union, but contains the real potential to destroy land, if not also persons, within the union. Unless and until Congress alters the law, the apparent congressional intent of RCRA and SARA would seem to remain—better that hazardous waste be treated and disposed of somewhere, even if spread disproportionately among the states, than that future Superfund sites arise.

The challenged aspects of the executive orders and statutes, standing alone, may almost certainly prove to violate the Commerce Clause; however, South Carolina argues that either RCRA or CERCLA § 104(c)(9) authorize the otherwise invalid legislation. At the preliminary injunction stage, RCRA and CERCLA § 104(c)(9),

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[15] As we understand CERCLA § 104(c)(9), so long as South Carolina has theoretical capacity for its generated waste, South Carolina can continue to meet the requirements by refusing to sign interstate agreements to import additional waste. As we have remarked earlier, once theoretical capacity has been ensured, CERCLA § 104(c)(9) does not address the problem of where the waste actually goes.

however, do not appear to contain any language that indicates an unmistakably clear congressional intent to permit states to burden interstate commerce. *South Central Timber*, 467 U.S. at 91-92; *Nat'l Solid Wastes*, 910 F.2d at 721-22. Moreover, South Carolina has not as yet presented evidence from the legislative history of the two statutes that demonstrate such congressional intent.[16] *Maine*, 477 U.S. at 139. As in *New England Power*, "[n]othing in the legislative history or language of the statute evinces a congressional intent 'to alter the limits of state power otherwise imposed by the Commerce Clause . . . .'" 455 U.S. at 341 (citation omitted).

Lacking such support, South Carolina argues that the EPA's explanation of 40 C.F.R. § 271.4 is persuasive on this point. We are by no means prepared to accept that theory at the preliminary injunction stage as persuasive, nevermind, dispositive. EPA may deserve deference in its construction of its own regulations but it does not necessarily deserve deference with respect to whether Congress authorized it to permit states to violate the Commerce Clause.[17] As yet, no evidence indicates that Congress

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[16] *Northeast Bancorp. Inc. v. Bd. of Governors of Fed. Reserve Sys.*, 472 U.S. 159 (1985) does not indicate that the Supreme Court applies a different test to determine redefinition of the negative or dormant Commerce Clause. Extensive evidence about congressional intent through the legislative history of the bill was introduced. *Id.* at 168-73. Moreover, *Northeast Bancorp* employed the "plainly authorizes" rubric. *Id.* at 173.

[17] *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1983) does not mandate or even suggest a contrary result. South Carolina quotes *Chevron*'s statement that "if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Id.* at 843. Where no clear congressional intent to redefine the negative or dormant commerce clause can be found, an agency's answer that the negative Commerce Clause has been redefined is not "permissible." In such a case, Congress has not implicitly or "explicitly left a gap for the agency to fill. . . ." *Id.*

intended to permit the states, directly or by EPA authorization, to engage in actions otherwise violative of the Commerce Clause.

Furthermore, EPA's published position on § 271.4 does not suggest a contrary conclusion. After *City of Philadelphia* was decided, EPA adopted § 271.4 on May 19, 1980. The EPA explained the theory behind the section:

> This section provides that any aspect of a State program which operates as a ban on the interstate movement of hazardous waste is automatically inconsistent. A recent court decision, *City of Philadelphia*, 437 U.S. 617 (1978), has held that such statutes are unconstitutional because they violate the interstate commerce clause, and EPA believes that decision is correct. However, since the text of RCRA speaks only to the "inconsistency" of State program submissions, not of State laws generally, this provision is restricted to the same extent.
>
> EPA believes that State requirements which forbid the construction or operation of hazardous waste disposal facilities could be subject to attack by the same reasoning adopted by the courts that have struck down transportation bans. A State that refuses entirely to allow a necessary part of national commerce—the disposal of hazardous wastes—to take place within its boundaries is impeding the flow of interstate commerce just as much as a State that refuses to allow the transportation of those wastes. The interstate commerce concerns involved here are underlined by the establishment through RCRA of a national regulatory scheme, even though that scheme is not on its face preemptive. Accordingly, State programs which contain provisions that prohibit treatment, storage or disposal of hazardous wastes within the State will be deemed inconsistent if the prohibition has no basis in human health or environmental protection.

45 Fed. Reg. 53395 (1980). Thus, EPA's initial explanation of § 271.4 indicated that it intended to use the "consistency" prong of RCRA to refuse to authorize a state program if any aspect of it might prove unconstitutional under the Commerce Clause. Moreover, the initial statement implied that EPA intended to extend the reasoning underlying *City of Philadelphia* to in-state construction bans. Even if courts were to find such bans constitutional, EPA may have hoped to claim the authority to refuse to authorize programs containing them.

South Carolina notably glosses over the initial statement and relies heavily on EPA's position five years later.[18] Admittedly, EPA's interpretation of § 271.4 has "altered" somewhat. For example, the second EPA explanation describes the first statement: "The Agency stated that any aspect of the program which operates as a ban on the interstate movement of hazardous waste is automatically inconsistent. The Agency noted that this position was supported by a court decision, *City of Philadelphia v. New Jersey* . . ." 50 Fed. Reg. 46438 (1985). However, the initial statement had implied that § 271.4(a) and EPA's decision that bans would be "inconsistent" was the *result of City of Philadelphia.*

Yet, in its later statement no longer does EPA seem to suggest that it will refuse to authorize programs containing laws or other elements that might be declared unconstitutional. Instead, EPA appears to have decided that not all restrictions would violate *City of Philadelphia*'s virtually *per se* rule of invalidity. EPA claimed,

> Section 271.4(a) does not by its terms prohibit any restrictions or impediments, only those that are unreasonable. Reasonable restrictions or impediments can logically include those that do not significantly

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[18] The second explanation accompanied EPA's RCRA authorization of South Carolina's program despite that state's imposition of a fee differential on in-state and out-of-state waste.

> decrease the flow of hazardous waste. Therefore, EPA does not agree that *any* disparity in treatment between in-State and out-of-State wastes is *per se* unreasonable. . . . [T]he preamble adopting this regulation did not state that EPA was relying on the Constitutional test for impremissible [sic] restraints on interstate commerce as the basis for finding restrictions or impediments unreasonable. The Agency is not required to adopt the Constitutional test for impediments or restrictions in interpreting its own regulations, and declines to do so here.
>
> More stringent requirements are expressly permitted [and] . . . may have some adverse effect on interstate commerce. Different requirements are permissible if they are not inconsistent with the Federal program and approved State programs. . . . The Agency does not believe that the mere existence of differences or disparities in treatment makes State programs inconsistent *per se*. . . . Congress gave EPA the authority to interpret the term "consistent;" the Agency has interpreted the term in § 271.4 to prevent unreasonable restrictions or impediments in authorized programs. Nothing in RCRA section 3006(b) . . . requires the Agency to adopt the Constitutional test as the test for consistency or unreasonable restrictions or impediments.

50 Fed. Reg. 46439 (1985). We are still unsure, however, of whether EPA was attempting to state (1) that some disparities might be constitutional, (2) that even if the disparities would be unconstitutional, EPA could approve the programs as "consistent," or (3) that EPA had the authority to permit otherwise unconstitutional state actions.

We need not struggle to resolve the import of the ambiguous second statement for the Constitution, RCRA, and the dictates of the Supreme Court sufficiently answer

our problem. States may not engage in economic protectionism and RCRA appears to contain no clear statement or indication of legislative intent to permit states to override the Constitution. EPA may change its interpretation of its own regulation; however, we cannot change the commands of the Constitution and Congress. *See Chevron, U.S.A., Inc. v. Natural Resources Defense Council,* 467 U.S. 837, 843 n.9 (1983).[19]

CERCLA § 104(c)(9) also does not appear to contain a clear authorization either in the statute itself or its legislative history South Carolina argues that § 104(c)(9) authorizes it to guarantee in-state capacity. But § 104 (c)(9) contains no such provision. Section 104(c)(9) requires an "assurance" of twenty-year availability of arranged adequate capacity. It does not state that the state must ensure that hazardous waste actually is treated and disposed of either in-state or pursuant to an interstate or regional agreement. CERCLA § 104(c)(9) contemplates that adequate national capacity will exist if each state can assure that it has adequate capacity for in-state generated waste after taking into consideration out-of-state waste that it has agreed to import and in-state waste that it has agreed to export. However, no part of § 104 (c)(9) appears to permit or require a state to limit its actual in-state capacity to in-state waste to receive Superfund money. *See* OSWER Directive 9010.00a at 4, 6. In fact, it appears that, if a state refuses to build in-state facilities or make alternate arrangements, it will be denied Superfund money, even if, in reality, all in-state generated waste is safely exported. If congressional intent had been to subject citizens of recalcitrant states to environmental danger by barring export of otherwise untreated and undisposed of hazardous waste, it could have been easily made clear. "A state not in compliance with this section

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[19] The Attorney General, with EPA's Office of General Counsel, listed as "Of Counsel," though appearing as an *amicus curiae* in the present case, has raised no contrary contention.

may not export any waste." In the absence of such intent, we suspect that Congress believed the penalty of no access to federal Superfunds for waste cleanup would be sufficient. *See Nat'l Solid Wastes*, 910 F.2d at 721-22.

RCRA and CERCLA § 104(c)(9) do not appear to evince congressional intent to redefine the Commerce Clause. Long have we held that the Constitution "was framed upon the theory that the peoples of the several states must sink or swim together, and that in the long run prosperity and salvation are in union and not division." *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511, 523 (1935); *see Healy*, 491 U.S. at 337 n.12. The acknowledged problems of hazardous waste do not compel us at the preliminary injunction stage to abandon this vision.[20]

We have dealt at some length with the questions the parties, especially South Carolina, have to face when they proceed to a decision on the merits. We do not decide them but merely address the *Blackwelder* factors. We conclude that likelihood of irreparable harm to the plaintiff will be measurably greater if the preliminary injunction (as modified) is denied. Facts yet to be raised may differently invoke the controlling doctrine. *See Rum Creek Coal*, 926 F.2d at 367. " 'We hold only that the questions of fact and law raised on the record at this point are, under controlling doctrine, sufficiently serious and grave ones that, when considered with the balance of potential harms, the district court's injunctive order should stand pending trial.' " *Id.* (citation omitted). Accordingly, we remand in part to allow the district judge (1) to modify the order by striking the words that confus-

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[20] Because we find Commerce Clause analysis sufficient to justify the preliminary injunction, we do not consider the Supremacy Clause argument briefly addressed on appeal. The Privileges and Immunities Clause claim was not addressed by the district court and has not been argued on appeal. If the district court were to find the Commerce Clause requirement against Regulation 61-99 unlikely to succeed, the court should also consider these other claims of constitutional dimension.

ingly imply a declaration of invalidity, (2) to modify the order to apply only to the specific portions of the executive orders and statutes challenged as violating the Commerce Clause, and (3) to consider explicitly the balance of hardships with respect to Regulation 61-99. We affirm the remainder of the opinion.

AFFIRMED IN PART; REMANDED IN PART

APPENDIX D

[Filed Jan. 11, 1991]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
(Columbia Division)

C.A. No. 3.90-1402-0

HAZARDOUS WASTE TREATMENT COUNCIL,
Plaintiff,

v.

STATE OF SOUTH CAROLINA, *et al.*,
Defendants.

PRELIMINARY INJUNCTION AND ORDER

Upon consideration of Plaintiff's Motion for Preliminary Injunction, Defendants' Opposition, and the entire record in this case, it appearing that:

(1) Plaintiff is likely to succeed on the merits of its claim that the South Carolina laws at issue violate the Commerce Clause (U.S. Const. art. I, § 8, cl.3) and the Supremacy Clause (U.S. Const. art. IV, cl. 2), including 40 C.F.R. § 271.4; and

(2) Plaintiff and its members will suffer irreparable harm in the absence of a preliminary injunction in that the commercial firms which are Plaintiff's members have been and are being adversely affected by the South Carolina laws at issue and have no adequate remedy at law; and

(3) Defendants will not be harmed by issuance of a preliminary injunction; and

(4) The public interest will be served by the issuance of a preliminary injunction,

it is this 11th day of January 1991,

ORDERED that the motion is hereby granted. A preliminary injunction shall issue forthwith, enjoining Defendants from enforcing, applying, or attempting to apply those sections of the following laws which this Court declares are invalid: Executive Orders 89-17 and 89-25; DHEC Regulation 61-69 (January 12, 1990); H.3169 (R. 729) (June 13, 1990), adding S.C. Code Ann. § 44-56-59 and amending S.C. Code Ann. § 44-56-60; and Act No. 196 of 1989, §§ 5, and 9, amending S.C. Code Ann. §§ 44-56-205 and 44-56-130.

/s/ Matthew J. Perry
United States District Judge

[Filed Jan. 11, 1991]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
COLUMBIA DIVISION

Civil Action No. 3:90-1402-0

HAZARDOUS WASTE TREATMENT COUNCIL,
On behalf of itself and its members,
Plaintiff,

-vs-

STATE OF SOUTH CAROLINA,
John T. Campbell,
Secretary of State,
Wade Hampton Building,
P.O. Box 11350,
Columbia, SC 29211,

-and-

CARROLL A. CAMPBELL, JR.,
Governor, in his official Capacity,
State House,
P.O. Box 11369,
Columbia, SC 29211,

-and-

COMMISSIONER South Carolina Department of
Health and Environmental Control,
in his official capacity,
2600 Bull Street,
Columbia, SC 29201,

-and-

SOUTH CAROLINA DEPARTMENT OF HEALTH AND ENVIRONMENTAL CONTROL,
2600 Bull Street,
Columbia, SC 29201,
Defendants.

MEMORANDUM AND ORDER

The plaintiff Hazardous Waste Treatment Council, a corporate trade association with approximately seventy member firms providing licensed services of treatment, recycling and disposal of hazardous wastes, commenced this action against the defendants State of South Carolina, its Governor, The South Carolina Department of Health and Environmental Control (DHEC) its Commissioner and its Board for declaratory and injunctive relief, prohibiting implementation of certain restrictions which defendants have placed upon treatment and disposal, in South Carolina facilities, of hazardous wastes generated in other states. The matter is now before the Court pursuant to the plaintiff's motion for a preliminary injunction, barring enforcement of the restrictions.

In its complaint the plaintiff challenges South Carolina's announced purpose, set forth in its statutes, regulations and Executive Orders to (1) prohibit passage and disposition into South Carolina facilities, hazardous wastes generated in states which have not provided within their borders facilities for the disposal of hazardous wastes; (2) impose discriminatory quotas upon the quantities of such wastes otherwise permitted; and (3) create a mandatory preference for wastes generated in South Carolina. Specifically plaintiff contends that South Carolina's statutes, Executive Orders and regulations

(1) prohibit plaintiff's member companies located in South Carolina from accepting any hazardous wastes generated outside the State *unless* the state of origin reciprocates and is free of bans on permitting hazardous

waste treatment, storage and disposal within its borders—a blacklisting of generators from certain states, barring them from engaging in commerce within South Carolina;

(2) require plaintiff's member companies located in South Carolina to provide a "preference" in their operations for hazardous wastes within South Carolina over any such wastes generated outside this State—a preferred "right of access" which discriminates against generators from all other states;

(3) impose artificial, arbitrary and discriminatory quotes on the volume of hazardous wastes which may be disposed within this State by limiting disposal of wastes originating from other states;

(4) impose artificial and discriminatory requirements for the permitting of any new or expanded hazardous waste management facility proposed within South Carolina—requiring a "demonstration of in-state need" regarding hazardous waste treatment, storage and disposal in the permit applications from including projections of wastes generated from any other states as a basis for their statement of "need." Memorandum of Points and Authorities in Support of Motion for Preliminary Injunction, pp. 2, 3. Plaintiff contends that these laws (1) discriminate against the free flow of interstate commerce—a violation of the Commerce Clause (U.S. Const. Art. I, § 8 cl. 3); and (2) conflict with and are preempted by the federal hazardous waste management regulatory program —a violation of the Supremacy Clause (U.S. Const. Art. VI, cl. 2) and federal regulations prohibiting such laws (40 C.F.R. § 271.4).

Plaintiff asserts that on account of the challenged South Carolina laws, its members are unable to participate fully in the important business of national waste management that [sic] and they are losing business revenues for which they lack any remedy at law. Plaintiff argues also that because these laws are adverse to the public interest—

i.e. the free movement of hazardous wastes between all states for safe and effective treatment and disposal—this Court should issue a preliminary injunction.

Defendants deny that their statutory laws, executive orders and regulations violate the Constitution as alleged. Defendants assert that "[t]he South Carolina program represents a fully permissible response to the federal mandate; that the State has formulated its own Hazardous Waste Management Program which has been approved by the Environmental protection Agency (EPA); the State has submitted and gained federal approval of a Capacity Assurance Plan ("CAP") for managing hazardous wastes generated within the State over the next twenty years and thus has preserved its right to remedial-action Superfund monies supplied by EPA; and the State has entered into a regional agreement that coordinates and provides for the needs of both in-state and out-of-state generators of hazardous waste." DEFENDANTS' MEMORANDUM IN OPPOSITION TO PLAINTIFF'S MOTION FOR A PRELIMINARY INJUNCTION, p. 3. Defendants also argue that, because federal law requires that South Carolina ensure that it can provide for the treatment and disposal of all hazardous wastes generated in the State in the next twenty years, South Carolina must consider separately—and fashion an allocation between both in-state and out-of-state generators—which has been expressly commanded and thus sanctioned by Congress and that, moreover, South Carolina's particular CAP (including provisions at issue here) has been approved by EPA. *Id.*

BACKGROUND

The national problem of hazardous waste management has been addressed through a comprehensive Federal regulatory program administered by the United States Environmental Protection Agency (EPA) in cooperation with the states. In addition to Resource Conservation and Recovery Act ("RCRA"), Congress has enacted the Com-

prehensive Environmental Response, Compensation and Liability Act of 1980 ("CERCLA") the "Superfund" statute.[1] While RCRA addressed the management aspects of solid wastes, CERCLA addresses primarily the clean-up of untreated hazardous waste disposal sites. In 1980, exercising its authority under these statutes, EPA issued extensive regulations regarding implementation of state hazardous waste management programs. Thereafter, as a part of this nationwide program, EPA delegated to South Carolina certain authority to regulate hazardous waste management within the state. *See* 50 Fed. Reg. 46437 (November 8, 1985).

Despite congressional efforts, many states ignored the CERCLA facility assurance requirement and refused to permit any new treatment, storage, and disposal facilities. In their brief (p. 5) the defendants state that although most states were in agreement that the hazardous waste problem was a threat to the entire nation, many states and localities succumbed to the "not in my backyard" ("NIMBY") syndrome with the resultant effect that most hazardous waste continued to be shipped to the scarce existing facilities in a few select states.

Congress responded with the Superfund Amendments and Reauthorization Act of 1986 ("SARA"). SARA undertook to address the NIMBY problem by requiring states to provide additional assurance of adequate future capacity to treat and dispose of hazardous waste as a condition to the funding of Superfund site cleanups in the states. As added by SARA, section 104(c)(9) of CERCLA provides:

> (9) Sitting
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> Effective 3 years after October 17, 1986, the President shall not provide any remedial actions pursuant to this section unless the state in which the release occurs first enters into a contract or

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[1] 42 U.S.C. §§ 9601-9675 (1982 & Supp. IV 1986).

cooperative agreement with the President providing assurances deemed adequate by the President that the State will assure the availability of hazardous waste treatment or disposal facilities which—

(A) have adequate capacity for the destruction, treatment or secure disposition of all hazardous wastes that are reasonably expected to be generated within the State during the 20-year period following the date of such contract or cooperative agreement and to be disposed of, treated, or, destroyed,

(B) Are within the State or outside the State in accordance with an interstate agreement or regional agreement or authority,

(C) are acceptable to the President, and

(D) are in compliance with the requirements of subtitle C of the Solid Waste Disposal Act [42 U.S.C.A. § 6921 *et seq.*].

42 U.S.C. § 9604(c)(9).

As previously noted, RCRA envisaged that administrative and enforcement activities would primarily be performed by the states. To meet this end, RCRA § 3006(b) provides that states may apply to EPA for authorization to implement a hazardous waste treatment program "in lieu of the Federal program." *See* 42 U.S.C. § 6926(b). EPA's regulations implementing the statutory requirements for authorization of state programs are set forth in 40 C.F.R. Part 271 (1989). Entitled "REQUIREMENTS FOR AUTHORIZATION OF STATE HAZARDOUS WASTE PROGRAMS," Part 271 "specifies the procedures EPA will follow in approving, revising, and withdrawing approval of State programs and the requirements State programs must meet to be approved by

the Administrator under section 3006(b) and (f) of RCRA." 40 C.F.R. § 271.1(a).

In essence, RCRA § 3006 provides that EPA must authorize a state program unless it is found to be less stringent than the federal program outlined in RCRA, inconsistent with RCRA provisions or regulations, or simply inadequate in terms of its enforcement provisions. In implementing Section 3006, EPA provided:

> § 271.4 Consistency.
>
> To obtain approval, a State program must be consistent with the Federal program and State programs applicable in other States and in particular must comply with the provisions below. For purposes of this section the phrase "State programs applicable in other States" refers only to those State hazardous waste programs which have received final authorization under this part.
>
> (a) Any aspect of the State program which unreasonably restricts, impedes, or operates as a ban on the free movement across the State border of hazardous wastes from or to another State for treatment, storage, or disposal at facilities authorized to operate under the Federal or an approved State program shall be deemed inconsistent.
>
> (b) Any aspect of State law or the State program which has no basis in human health or environmental protection and which acts as a prohibition on the treatment, storage or disposal of hazardous waste in the State may be deemed inconsistent.
>
> (c) If the State manifest system does not meet the requirements of this part, the State program shall be deemed inconsistent.

40 C.F.R. § 271.4 (emphasis added. Part 271 also contains detailed provisions which specify the criteria and procedures for withdrawing approval of state programs,

including citizen petitions to EPA withdrawal and for participation on withdrawal proceedings. *See* 40 C.F.R. § 271.22 and § 271.23.

The National Problem of Hazardous Waste Management

Recognizing the need for a hazardous waste management program that is "national in scope and concern, Congress enacted the Resource Conservation and Recovery Act (RCRA in 1976. 42 U.S.C. § 6901(a)(4). This national program encourages states to cooperate with EPA and their sister states regarding the entire hazardous waste management field. While EPA retains authority to administer the national program, participating states may implement their own waste management programs so long as they are "equivalent" and "consistent" with EPA regulations. RCRA § 3006(b) 42 U.S.C. § 6926(b).

To determine whether an approved state hazardous waste management program is "consistent with" the Federal regulatory scheme, EPA issued regulations setting forth specific criteria. *See* 40 C.F.R. § 271. These regulations emphasize that "Congress intended (through enactment of RCRA,) for State programs receiving final (EPA) authorization to become fully part of an integrated national program to control hazardous waste." 45 Fed. Reg. 3393 (May 19, 1980). Critical to the success of this "national program" is that "the interstate commerce concerns involved here are emphasized by the establishment through RCRA of a national regulatory scheme, even though that scheme is not on its face preemptive (of State programs)." *Id.*

Consistent with the national approach to the hazardous waste management field, Congress enacted certain amendments to RCRA through passage of the Hazardous and Solid Waste Amendments ("HSWA") Pub. L. No. 98-516. These amendments emphasized further the scope of the national problem and the need to employ state-of-the-art hazardous waste management technology across the

country. Consequently, these amendments established national land disposal restrictions which require that hazardous wastes be treated by using the "best demonstrated available technology" before the waste can be land-disposed. *See* 42 U.S.C. § 6924(d)-(m).[2]

Hazardous Waste Management in South Carolina

There are three facilities located in South Carolina—all operated by plaintiff's members—licensed under federal and state law to treat, store or dispose of hazardous wastes. The largest facility, owned and operated by Laidlaw Environmental Services, Inc. (formerly GSX Chemical Services, Inc.) in Pinewood, South Carolina, consists primarily of secure, engineered landfill permitted by EPA on an interim basis in 1980 and fully permitted by both EPA and the South Carolina Department of Health and Environmental Control (DHEC) in 1989.[3] The two other facilities both operate waste incinerators. One (a rotary kiln incinerator) is owned by a Laidlaw subsidiary, Thermal Oxidation Corporation in Roebuck, South Carolina.[4] The other (an open hearth incinerator) is owned by T[h]ermalKEM, Inc., and is located in Rock Hill, South Carolina.[5]

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[2] Plaintiff argues that Congress enacted the HSWA land disposal amendments directly because plaintiff's members could provide the most advanced and effective waste management technologies and services.

[3] *See* Affidavit of Roger E. Davis at ¶¶ 5, & 7. Landfills such as Laidlaw's must be constructed with dual synthetic liners beneath the waste, leachate collection systems to remove liquids, leak detection systems, and a groundwater monitoring system. There are only a limited number of major commercial landfills authorized for hazardous waste disposal in the United States and, like Laidlaw, all serve customers on a national basis. Fortuna Affidavit at ¶. 7.

[4] Davis Affidavit at ¶ 4.

[5] Recognized by EPA as the "Best demonstrated achievable technology" for many hazardous wastes, incineration reduces the

From their inception, all three facilities have accepted hazardous Wastes generated from outside South Carolina. Because of the specialized skills and complex technology required to meet federal and state regulations, there are a limited number of commercial facilities in the country that can safely and effectively treat and dispose of hazardous wastes. Fortuna Affidavit at ¶ 7.

Therefore, these three South Carolina facilities have historically served out-of-state generators of hazardous wastes.[6] At the same time these facilities conduct a substantial volume of business with generators located within South Carolina. Zeigler Affidavit at ¶ 15. Davis Affidavit.

Additionally, many of plaintiff's members located outside South Carolina conduct business with facilities in South Carolina.[7] Some of these out-of-state facilities receive hazardous wastes generated by and shipped from South Carolina companies.[8] Plaintiff argues that the availability of an environmentally secure engineered, licensed disposal facility in South Carolina ensures that its out-of-state members—several of whom are engaged in Superfund cleanup activities—will dispose of their wastes in an environmentally safe manner and that any disruption in the availability or capacity of the three South Carolina facilities interferes significantly with the ability

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volume of waste by 70 percent, and is capable of treating 85 percent of the hazardous waste generated in the United States. Affidavit of William J. Ziegler at ¶¶ 6 and 9. A licensed incinerator must consistently destroy at least 99.99 percent of the principal hazardous constituents in the processed wastes. Ziegler Affidavit at ¶ 7; Fortuna Affidavit at ¶ 1.

[6] Affidavits of Jerry P. Deakle (at ¶ 3), Phil Fuller (at ¶ 3), James L. Chocklett (at ¶ 3), Tim Mitchell (at ¶ 3), and Samir Coluche (at ¶¶ 3 and 4).

[7] Mossholder Affidavit at ¶ 2; Robertson Affidavit at ¶ 2.

[8] *See* Robertson Affidavit at ¶ 4.

of plaintiff's out-of-state members to conduct their business.[9]

The Challenged South Carolina Laws, Executive Orders and Regulations

Beginning in 1988 South Carolina enacted the First of a series of laws restricting and prohibiting the importation of hazardous wastes generated in other states.

1. In 1988 DHEC began conditioning the issuance of permits for any new or expanded facility upon the needs of "in-state" generators. DHEC submitted permanent regulations containing this requirement to the South Carolina General Assembly in February 1989. The regulation (DHEC Reg. 61-99) was approved (through expiration of a statutory waiting period) on January 12, 1990.[10] Davis Affidavit at ¶ 25. The permit regulation requires an applicant to demonstrate "in-state need" for issuance of a permit regarding any new facility or expansion of an existing facility. Reg. 61-99. Before a permit may issue, an applicant must document:

(1) the remaining available capacity at other existing facilities within South Carolina;

(2) The current volume of wastes generated within the State which will require off site management and an annual projection of such volume for each of the next five years—the "in-state" need; and

(3) the existence of additional available capacity outside South Carolina which may serve to project in-state need.

DHEC Reg. 61-99 111(C).

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[9] Mossholder Affidavit at ¶¶ 3, 5; Robertson Affidavit at ¶¶ 3, 4.

[10] In the interim, DHEC promulgated several emergency measures to prevent issuance of any faciilty permit until the permament regulations were approved. *See* Ziegler Affidavit at ¶¶ 31-32.

The permit regulations mandate that "for purposes of demonstrating need, hazardous waste generated outside the State of South Carolina shall not be included." [11] DHEC Reg. 61-99 111 (C).

2. The Blacklisting Laws

On January 19, 1989 Governor Campbell issued Executive Order 89-03 which banned South Carolina from accepting any waste originating from certain states. Executive Order 89-03 provided that effective March 1, 1989:

> No person who owns or operates a disposal facility in this State shall accept a hazardous waste which is generated in another State and is banned or prohibited for disposal by any statute, regulation or administrative decision of the State.

Executive Order No. 89-03 at 4. The Executive Order was extended and amended by Executive Order 89-17 which was issued on April 3, 1989. In June 1989, by passage of Act No. 196 of 1989 the South Carolina General Assembly enacted it into law.[12]

South Carolina sent copies of its laws to the environmental quality directors of all its sister states and sought immediate certification that their state did not ban the

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[11] Plaintiff argues that as these regulations deny the relevance of national needs, and that they are interfering with the national program designed to safely and efficiently manage the ever growing national program.

[12] The statute provides:

> It is unlawful for any person who owns or operates a waste treatment facility within this State to accept any hazardous waste generated in any jurisdiction which prohibits by law the treatment of that hazardous waste within that jurisdiction or which has not entered into an interstate or regional agreement for the safe treatment of hazardous waste.

S.C. Code Ann. § 44-56-130(4).

treatment of hazardous wastes within its borders. Davis Affidavit at ¶ 9. Thereafter, the first blacklist was published on March 3, 1989, listing nearly half the states in the nation. *See* DHEC, Status of Governor Campbell's Executive Order No. 89-03 (March 3, 1989).

Plaintiff argues that the blacklisting laws have caused its South Carolina members facilities to lose customers in states that are currently blacklisted.[13]

The Preference Requirement for South Carolina Generated Wastes

The same laws which blacklisted nonconforming states also establishes an additional obstacle to treatment and disposal of out-of-state generated wastes. Executive Order 89-03, its successor Executive Order 89-17 and Act No. 196 provided:

> All hazardous waste treatment and disposal facilities in South Carolina shall give preference to hazardous waste generators within the State of South Carolina for treatment and disposal of hazardous materials at licensed facilities within the State.

The preference requirement has the express purpose of restricting the amount of out-of-state generated wastes that are treated and disposed of in South Carolina.

The Discriminatory Quotas of Out-of-State Wastes

On July 6, 1989 Governor Campbell issued Executive Order No. 89-25. Executive Order 89-25 allocates the portion of the overall statutory quota that may be applied to out-of-state generators

> Hazardous waste disposal facilities operating in South Carolina shall reserve 54,000 tons per year of the statutory maximum of 135,000 tons per year for South Carolina generated hazardous waste; pro-

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[13] Davis Affidavit at ¶¶ 17-18.

> vided further that of the remaining 81,000 tons, a hazardous waste disposal facility may not receive more than 10,000 tons from any state in any calendar quarter, not to exceed the annual cap of 35,000 tons.

Executive Order 89-25 also includes a clause which enable[s] a "sharing of excess in-state capacity" at the end of a calendar year.[14] However, this provision is also contingent upon a preference for South Carolina wastes:

> In reviewing such demonstrations (for available excess capacity) the Department is hereby directed to consider past utilization of the site and anticipated South Carolina needs, including but not limited to waste generated from state and Federal Superfund cleanup activities.

Executive Order No. 89-25 at 4.

On June 13, 1990 Governor Campbell signed into law H. 3169 (R. 729) amending the statutory quota, adding S.C. Code Ann. § 44-56-59 and amending S.C. Code Ann. § 44-56-60. This new amendment has the following effect:

> (1) it reduces the annual quota on all out-of-state generated waste from 135,000 to 120,000;
>
> (2) when combined with the capacity restrictions imposed by Executive Order 89-25, it reduces the annual portion allocated for out-of-state wastes to a maximum of 66,000 tons (55% of total capacity) this year and to 56,000 tons (51% of that capacity) in July 1991 when a 110,000 ton quota takes effect;

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[14] If after the third quarter of any calendar year, and upon demonstration to DHEC that the capacity reserved for South Carolina generators will not be required in the remainder of the year, the excess capacity may be offered to non South Carolina generators. Executive Order 89-25 at 4.

(3) it allows land disposal in excess of the annual 120,000 ton quota only if (a) the excess waste is from a South Carolina site or (b) at least 110,000 tons of South Carolina waste has been disposed of by land burial in this state during the year;

(4) it lowers the annual quota even further by limiting generators in each state to the disposal volume that all generators in their state shipped in the previous 12 months.

* * * * * *

Plaintiff argues that the net effect of these "protectionist" laws is that they are having the effect of interfering with the free flow of interstate commerce.

The Commerce Clause

The United States Constitution gives Congress the power to regulate commerce among the States.[15] Also, the Commerce Clause of the Constitution limits the authority of a state to discriminate against interstate commerce. *New Energy Co. of Indiana v. Limbach*, 486 U.S. 269, 273 (1988); *Hughes v. Oklahoma*, 441 U.S. 322, 326 (1979); *H. P. Hood & Sons Inc. v. Dumond*, 336 U.S. 525, 534-35 (1949); *Welton v. Missouri*, 91 U.S. 275 (1876). This "negative aspect" of the Commerce Clause—limiting the power of the states to regulate interstate commerce—prohibits a state from placing its parochial interests above the national interest in the free flow of interstate commerce. *New Energy*, 486 U.S. at 273-74. Indeed, state laws that discriminate against interstate commerce are "routinely" struck down "unless the discrimination is demonstrably justified by valid factors unrelated to economic protectionism." *Id.* at 274 citing

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[15] United States Constitution, Art. 1 § 8, cl. 3:

The Congress shall have power—to regulate Commerce with foreign Nations, and amount the several States. . . .

Maine v. Taylor, 477 U.S. 131 (1986). The Supreme Court has explained the broad purpose of the Commerce Clause as follows:

> The principle that our economic unit is the Nation, which alone has the gamut of powers necessary to control of the economy, including the vital power of erecting customs barriers against foreign competition, has as its corollary that the states are not separable economic units. As the Court said in *Baldwin v. Seelig*, 294 U.S. 511, 527, 'what is ultimate is the principle that one state in its dealings with another may not place itself in a position of economic isolation.'[1]

H. P. Hood & Sons, Inc. v. Dumond, 336 U.S. 525, 537-538 (1949).

The Supreme Court is alert to the evils of "economic isolation" and protectionism but has recognized that incidental burdens on interstate commerce may be unavoidable when a State legislates to safeguard the health and safety of its people. For example, the Supreme Court has upheld a Maine statute that prohibited the importation of a certain type of baitfish not native to Maine because the baitfish contained a parasite that would have a serious detrimental effect on Maine's fisheries. *Maine v. Taylor*, 477 U.S. 131 (1986). Such state laws do not discriminate against interstate commerce; they "simply prevent traffic in noxious articles, whatever their origin." *Philadelphia v. New Jersey*, 437 U.S. 617 1978. But "where simple economic protectionism is effected by state legislation, a virtually *per se* rule of invalidity has been erected." *City of Philadelphia v. State of New Jersey*, 437 U.S. 617, 624 (1978). *See H. P. Hood & Sons, Inc. v. Dumond, supra; Toomer v. Witsell*, 334 U.S. 385, 403-406 (1948). And the clearest example of such legislation is a law that overtly blocks the flow of interstate commerce at a State's borders. *Welton v. Missouri*, 91 U.S. 275 (1876).

Of binding precedential value in this case is the Supreme Court's decision striking down, on Commerce Clause grounds, New Jersey's efforts to construct a barrier to the shipment of wastes for treatment and disposal in that state. Exasperated over the mounting problems of out-of-state wastes, New Jersey enacted a statute which provided that "no person shall bring into this State solid or liquid waste which originated or was collected outside the territorial limits of the State. . . . *Philadelphia v. New Jersey*, 437 U.S. 617 (1978). The Court stated that

> [I]t does not matter whether the ultimate aim of (New Jersey's protectionist law) is to reduce the waste disposal costs of New Jersey residents or to save remaining open lands from pollution, for we assume New Jersey has every right to protect its residents pocketbooks as well as their environment. And it may be assumed as well that New Jersey may pursue those ends by slowing the flow of all waste into the State's remaining landfills, even though interstate commerce may be incidentally affected. But whether New Jersey's ultimate purpose, it may not be accomplished by discriminating against articles of commerce coming from outside the State unless there is some reason, apart from their origin to treat them differently. . . .

Id. at 626-627. *See also National Solid Wastes Management Association, et al v. The Alabama Department of Environmental Management, et al.* 910 F.2d 713 (11th Cir. 1990) which declared unconstitutional an Alabama law prohibiting that state's commercial waste management facilities from accepting hazardous wastes generated in other states unless the other states met certain requirements.

The defendants argue that the challenged hazardous waste laws, Executive Orders and regulations do not conflict with the Commerce Clause of the Constitution

because South Carolina's hazardous waste management program has been approved by EPA under RCRA, CERCLA and SARA; that when Congress enacted RCRA it stated its intent that each state be permitted to implement its own hazardous waste program. RCRA § 3006(b), 42 U.S.C. § 6926(b).

Defendants point to a provision preserving state authority over regulation of hazardous waste which provides that

> Upon the effective date of regluations under this subchapter no state or political subdivision may impose any requirements less stringent than those authorized under this subchapter respecting the same matter as governed by such regulations. . . . Nothing in this chapter shall be construed to prohibit any State or political subdivision thereof from imposing any requirements, including those for site selection, which are more stringent than those imposed by such regulations.

RCRA § 3009, 42 U.S.C. § 6929.

Defendants cite *Northeast Bancorp, Inc. v. Board of Governors of the Federal Reserve System,* 472 U.S. 159, 174 (1985) where the Court addressed the constitutionality of certain state laws concerning interstate bank acquisitions. Under the Bank Holding Company Act of 1956, 12 U.S.C. § 1841, *et seq.*, before a bank holding company could acquire a bank, it has to obtain the approval of the Federal Reserve Board (FRB). An amendment to the Bank Holding Company Act (the Douglas Amendment) prohibited the FRB from approving an interstate acquisition unless the acquisition was "specifically authorized by the statute laws of the State in which such bank is located, by language to that effect and not merely by implication." 12 U.S.C. § 1842(d). In the early 1980's several New England states enacted statutes lifting the Douglas Amendment ban, but only on a reciprocal basis within the geographic region. The state laws were chal-

lenged on Commerce Clause and other constitutional grounds. The Court found the state laws to be within the kind contemplated by the Douglas Amendment and constitutional. The Court stated that

> There can be little dispute that the dormant Commerce Clause would prohibit a group of States from establishing a system of regional banking, banking by excluding bank holding companies from outside the region if Congress had remained completely silent on the subject. *Lewis v. B. T. Investment Managers, Inc.*, 447 U.S. 27 (1980). Nor can there be serious question that an individual State acting entirely on its own authority would run afoul of the dormant Commerce Clause if it sought to comprehensively regulate acquisitions of local banks by out of state holding companies. *Sparhase v. Nebraska, ex rel Douglas*, 458 U.S. 941 (1982). But that is not our case. Here the commerce power of Congress is not dormant, but has been exercised by that body when it enacted the Bank Holding Company Act and the Douglas Amendment to the Act. Congress has authorized by the later amendment the Massachusetts and Connecticut statutes which petitioners challenge as violation of the Commerce Clause. When Congress so chooses, state actions which it plainly authorizes are invulnerable to constitutional attack under the Commerce Clause.

Northeast Bankcorp, Inc. v. Board of Governors of the Federal Reserve System, 472 U.S. at 174. The defendants argue that the South Carolina hazardous waste provisions fall within the realm "plainly authorized" by Congress and must be measured accordingly. So viewed, the defendants argue, the South Carolina hazardous waste provisions are invulnerable to constitutional attack.

While Congress can authorize States to erect barriers to interstate commerce, such congressional authorization must be "expressly stated" and "unmistakably clear."

"Where state or local government action is specifically authorized by Congress, it is not subject to the Commerce Clause even if it interferes with interstate commerce." *White v. Massachusetts Council of Constr. Employers, Inc.*, 460 U.S. 204 (1983). Indeed, "Congress may redefine the distribution of power over interstate commerce in a manner which would otherwise not be permissible." *South-Central Timber Devel, Inc. v. Wunnicke*, 467 U.S. 82, 87-88 (1984). But such congressional intent or authorization for states to affect interstate commerce, however, must be "expressly stated" and unmistakably clear." *Id.* at 91.

But nothing is contained in either statute, RCRA, CERCLA or SARA that has "expressly stated" in "unmistakably clear" language congressional authorization for South Carolina to take action in the mangement of its hazardous waste program that adversely effects interstate commerce. *See National Solid Waste Management Association, et al. v. Alabama Department of Environmental Management*, 910 F. 2d 713 (11th Cir. 1990).

The Standard for Interlocutory Injunctive Relief

In this Circuit, a Court's determination of whether to grant or withhold interim injunctive relief is governed by four preliminary determinations:

(1) the plaintiff's likelihood of success on the merits of the underlying dispute; (2) whether the plaintiff will suffer irreparable harm if interim relief is denied; (3) the harm to the defendant if an injunction is issued; and (4) the public interest. *Quince Orchard Valley Citizens Association, Inc., et al v. Hodel, et al.*, 872 F. 2d 75 (4th Cir. 1989); *North Carolina State Ports Authority v. Dart Containerline Co. Ltd.*, 952 F. 2d 749 (4th Cir. 1979). The trial court must weigh each of these factors in light of the " 'flexible interplay' among all the factors considered." *Quince Orchard Valley Citizens Ass'n, Inc. v. Hodel, supra* at 79, *citing Blackwelder Furn. v. Seilig*

Mfg. Co., 550 F. 2d 189, 196 (4th Cir. 1977). If the likelihood of success on the merits is great, the need for showing the probability of irreparable harm is less. Conversely, if the likelihood of success is remote, there must be a strong showing of the probability of irreparable injury to justify the issuance of the injunction." *Id.* at 79; *State Ports Authority*, 592 F. 2d at 750. "Finally, the court must balance the potential harm to the plaintiff, if relief is denied, against the potential harm to the defendant if an injunction issues. In striking this balance, a trial court must be mindful of the effect of the decision, if any, on broader concerns of public interest. *Quince Orchard Valley Citizen Ass'n v. Hodel*, 872 F. 2d at 79.

1. In this case, the plaintiff's likelihood of success on the merits is apparent. For more than two hundred years the Commerce Clause (U.S. Const. Art. VI, cl. 2) has ensured that the States, in dealing with each other as well as with the Federal government (1) will not engage in "economic protectionism" to the disadvantage of the free flow of interstate commerce, and (2) will not engage in activities conflicting with federal laws and policies. Each of the statutes, Executive Orders and regulations challenged by the plaintiff in this case will, if enforced by the defendants, interfere with interstate commerce. Plaintiff will likely succeed on the merits in their challenge to these actions under the Commerce Clause.[35]

2. The statutes, Executive Orders and regulations which plaintiff challenge are causing injury to the plaintiff's members. The effect of the challenged laws on plaintiff's three member facilities located within South Carolina is manifested by the loss of revenues; by the manner in which they are restricted and limited in the total amount of wastes they may receive from particular states and by

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[35] While it is apparent that plaintiff will prevail on the merits in its challenges under the Supremacy Clause, that determination is not reached in this opinion. Instead, it will be treated, if necessary, in the final order.

the requirement that they choose from among their customers who happen to be from the same state. Customers or potential customers of plaintiff's members who happen to be located within "blacklisted" states are barred from doing business with them. The "preference" requirements require plaintiff's South Carolina members' facilities to turn away long standing customers who are located outside South Carolina. The "in state need" requirement contained in the permit regulations also have injured the business interests of plaintiff's South Carolina members.

Plaintiff's members located outside South Carolina are also suffering harm. Members residing in a blacklisted state are barred from sending shipments to facilities located in South Carolina and must find alternative treatment facilities if possible.[16] Plaintiff's members residing outside South Carolina are subject to the second class status—and the increased cost and inconvenience—imposed by the challenged "preference" laws especially those combined with the discriminatory quotas. Mossholder Affidavit at ¶ 7; Robertson Affidavit at ¶ 6.

3. It cannot be disputed that South Carolina has an interest indeed in overriding duty to protect human health and the environment. It is equally clear that each of the laws here challenged, seeks to achieve that goal. But here the plaintiff challenges only those portions of the challenged laws whose purpose is to discriminate against out of state hazardous wastes based solely on their place of origin. Hazardous wastes generated out of state pose no more threat to human health and the environment than hazardous wastes generated in South Carolina. *See Philadelphia v. New Jersey*, 437 U.S. at 629.

4. Finally, the public interest is best served by the grant of preliminary injunction relief. Significantly, plain-

[16] *See* Cocklett Affidavit at ¶ 6; Culler Affidavit at ¶ 6; Colouche Affidavit at ¶ 7; Deakle Affidavit at ¶ 7; Mitchell Affidavit at ¶ 7.

tiff's members are in the business of complying with the comprehensive regulatory scheme and developing and utilizing safe and efficient treatment and disposal systems for hazardous wastes. Thus, human health and the environment will not be adversely affected by the issuance of injunctive relief.

It may not be gainsaid that the public interest is best served when unconstitutional laws are enjoined.

South Carolina has, by the challenged statutes, Executive Orders and regulations, erected an unlawful economic barrier at its border. Notwithstanding the stated purpose expressed in these laws, to limit within its borders the treatment and disposal of wastes generated from other states—while not imposing similar prohibitions on wastes generated within South Carolina—it cannot isolate itself from the flow of commerce by erecting discriminatory barriers.

CONCLUSION

Upon consideration of pleadings, the affidavits, the memoranda and arguments of counsel, and for the reasons above stated, the plaintiff's motion for a preliminary injunction is hereby granted.

IT IS SO ORDERED.

/s/ Matthew J. Perry
MATTHEW J. PERRY
United States District Judge

Columbia, South Carolina,
January 11, 1991.

APPENDIX E

Resource Conservation and Recovery Act of 1976, as amended, § 3006

42 U.S.C. § 6926. Authorized State hazardous waste programs

(a) Federal guidelines

Not later than eighteen months after October 21, 1976, the Administrator, after consultation with State authorities, shall promulgate guidelines to assist States in the development of State hazardous waste programs.

(b) Authorization of State program

Any State which seeks to administer and enforce a hazardous waste program pursuant to this subchapter may develop and, after notice and opportunity for public hearing, submit to the Administrator an application, in such form as he shall require, for authorization of such program. Within ninety days following submission of an application under this subsection, the Administrator shall issue a notice as to whether or not he expects such program to be authorized, and within ninety days following such notice (and after opportunity for public hearing) he shall publish his findings as to whether or not the conditions listed in items (1), (2), and (3) below have been met. Such State is authorized to carry out such program in lieu of the Federal program under this subchapter in such State and to issue and enforce permits for the storage, treatment, or disposal of hazardous waste (and to enforce permits deemed to have been issued under section 6935(d)(1) of this title) unless, within ninety days following submission of the application the Administrator notifies such State that such program may not be authorized and, within ninety days following such notice and after opportunity for public hearing, he finds that

(1) such State program is not equivalent to the Federal program under this subchapter, (2) such program is not consistent with the Federal or State programs applicable in other States, or (3) such program does not provide adequate enforcement of compliance with the requirements of this subchapter. In authorizing a State program, the Administrator may base his findings on the Federal program in effect one year prior to submission of a State's application or in effect on January 26, 1983, whichever is later.

(c) Interim authorization

(1) Any State which has in existence a hazardous waste program pursuant to State law before the date ninety days after the date of promulgation of regulations under sections 6922, 6923, 6924, and 6925 of this title, may submit to the Administrator evidence of such existing program and may request a temporary authorization to carry out such program under this subchapter. The Administrator shall, if the evidence submitted shows the existing State program to be substantially equivalent to the Federal program under this subchapter, grant an interim authorization to the State to carry out such program in lieu of the Federal program pursuant to this subchapter for a period ending no later than January 31, 1986.

(2) The Administrator shall, by rule, establish a date for the expiration of interim authorization under this subsection.

(3) Pending interim or final authorization of a State program for any State which reflects the amendments made by the Hazardous and Solid Waste Amendments of 1984, the State may enter into an agreement with the Administrator under which the State may assist in the administration of the requirements and prohibitions which take effect pursuant to such Amendments.

(4) In the case of a State permit program for any State which is authorized under subsection (b) of this section or under this subsection, until such program is amended to reflect the amendments made by the Hazardous and Solid Waste Amendments of 1984 and such program amendments receive interim or final authorization, the Administrator shall have the authority in such State to issue or deny permits or those portions of permits affected by the requirements and prohibitions established by the Hazardous and Solid Waste Amendments of 1984. The Administrator shall coordinate with States the procedures for issuing such permits.

(d) Effect of State permit

Any action taken by a State under a hazardous waste program authorized under this section shall have the same force and effect as action taken by the Administrator under this subchapter.

APPENDIX F

Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended, § 104(c)(9)

42 U.S.C. § 9604(c)

(9) Siting

Effective 3 years after October 17, 1986, the President shall not provide any remedial actions pursuant to this section unless the State in which the release occurs first enters into a contract or cooperative agreement with the President providing assurances deemed adequate by the President that the State will assure the availability of hazardous waste treatment or disposal facilities which—

(A) have adequate capacity for the destruction, treatment, or secure disposition of all hazardous wastes that are reasonably expected to be generated within the State during the 20-year period following the date of such contract or cooperative agreement and to be disposed of, treated, or destroyed,

(B) are within the State or outside the State in accordance with an interstate agreement or regional agreement or authority,

(C) are acceptable to the President, and

(D) are in compliance with the requirements of subtitle C of the Solid Waste Disposal Act [42 U.S.C.A. § 6921 et seq.]

APPENDIX G

40 C.F.R. § 271.4

§ 271.4 Consistency.

To obtain approval, a State program must be consistent with the Federal program and State programs applicable in other States and in particular must comply with the provisions below. For purposes of this section the phrase "State programs applicable in other States" refers only to those State hazardous waste programs which have received final authorization under this part.

(a) Any aspect of the State program which unreasonably restricts, impedes, or operates as a ban on the free movement across the State border of hazardous wastes from or to other States for treatment, storage, or disposal at facilities authorized to operate under the Federal or an approved State program shall be deemed inconsistent.

(b) Any aspect of State law or of the State program which has no basis in human health or environmental protection and which acts as a prohibition on the treatment, storage or disposal of hazardous waste in the State may be deemed inconsistent.

(c) If the State manifest system does not meet the requirements of this part, the State program shall be deemed inconsistent.

APPENDIX H

50 Federal Register 46,437

(Nov. 8, 1985)

40 CFR Part 271

[OSW-FRL-2921-6]

South Carolina; Decision on Final Authorization of State Hazardous Waste Management Program

AGENCY: Environmental Protection Agency.

ACTION: Notice of Final Determination on South Carolina's Application for Final Authorization.

SUMMARY: South Carolina has applied for Final Authorization under the Resource Conservation and Recovery Act (RCRA). EPA has reviewed South Carolina's application and has reached a final determination that South Carolina's Hazardous Waste Program satisfies all of the requirements necessary for Final Authorization. Thus, EPA is granting Final Authorization to the State to operate its program in lieu of the Federal program.

EFFECTIVE DATE: Final Authorization for South Carolina, for purposes of judicial review, shall be effective at 1:00 p.m. Eastern time, on November 22, 1985. However, in accordance with § 271.20(e), this Notice constitutes the Agency's official decision to approve South Carolina for Final Authorization.

FOR FURTHER INFORMATION CONTACT: Otis Johnson Jr., Chief, Waste Planning Section, Residuals Management Branch, Waste Management Division, U.S. Environmental Protection Agency, 345 Courtland Street, N.E., Atlanta, Georgia 30365, (404) 257-3016.

SUPPLEMENTARY INFORMATION:

I. Background

Section 3006 of the Resource Conservation and Recovery Act (RCRA) allows the Environmental Protection Agency (EPA) to authorize State hazardous waste management programs to operate in the State in lieu of the Federal program. To qualify for Final Authorization, a State's program must: (1) Be "equivalent" to the Federal program, (2) be consistent with the Federal program and other State programs, and (3) provide for adequate enforcement (Section 3006(b) of RCRA, 42 U.S.C. 6226 (b)). On July 23, 1984, South Carolina submitted a complete application to obtain Final Authorization to administer a RCRA program. On October 25, 1984, EPA published a tentative decision announcing its intent to grant South Carolina Final Authorization. Further background on the tentative decision appears at 49 FR 42959, October 25, 1984.

In the October 25 notice announcing the Agency's tentative determination, EPA announced the availability of the State's application for public review and comment and the date of a public hearing on the application. The public hearing was not held, since neither EPA nor the South Carolina Department of Health and Environmental Control received a significant show of interest in holding the hearing.

On March 5, 1985, the decision to grant final authorization to South Carolina was temporarily postponed. At that time, EPA decided to defer a final decision until July 1985 to allow the State a reasonable period of time to resolve identified issues.

Prior to EPA's review of the State's performance in July 1985, the South Carolina Hazardous Waste Management Act (1935 Act. No. 436) was amended to establish increased fees for disposal of hazardous waste. The amendments passed in June 1985 changed section 44-56-

170 to raise the fee for land disposal of wastes generated within the State from $5.00 to $13.00 per ton. For land disposal of wastes generated outside the State, the fee was raised from $7.50 per ton to either $18.00 per ton or to the amount that would be charged for land disposal by the State in which the wastes were generated, whichever is higher.

EPA determined that this statutory change constituted a substantial program revision, and in accordance with 40 CFR 271.20(b), the Agency decided to solicit public comment. On September 13, 1985 (50 FR 37385), EPA published a second notice of tentative determination to approve the State. In that notice, EPA highlighted the question of whether the South Carolina Hazardous Waste Management Act Amendments rendered the State program inconsistent with the Federal program or approved State programs under RCRA.

The question to be settled before EPA granted final authorization was whether the South Carolina fee schedule rendered the State program inconsistent with the Federal program and other State programs. Under § 271.4(a) a State treatment, storage or disposal at facilities authorized to operate under the Federal or an approved State program . . .". [sic]

In the notice of tentative determination, EPA stated that while higher fees for out-of-State wastes should not be encouraged, the Agency did not have any evidence to indicate that the new fees would unreasonably restrict, impede, or operate as a ban on the transportation of hazardous waste into the State. The only evidence before the Agency at that time were South Carolina's statements that the fee imposed constitutes a "relatively small percentage" of the actual cost of disposal and that, in the State's view, it would not unreasonably restrict or impede the movement of hazardous waste (50 FR 37386, September 13, 1985). The Agency solicited comment on whether the State law unreasonably restricts, impedes or operates as a ban on

the importation of hazardous waste, under the consistency requirements of 40 CFR 271.4(a). EPA received written comments and also held a public hearing in Columbia, South Carolina.

II. Basis for EPA's Decision to Grant Final Authorization

The Agency today is making a final determination that the South Carolina fee schedule does not impose an unreasonable impediment or restriction or operate as a ban on the free movement of hazardous waste under 40 CFR 271.4. The fee schedule is not inconsistent with the Federal program or approved State programs under this regulation or under RCRA. This section explains the reasons for the Agency's decision on this matter. Because this was the only outstanding issue, the Agency is now able to grant final authorization to the State.

A. EPA's regulation

EPA adopted the present regulation at 40 CFR 271.4 (a) on May 19, 1980 (see 45 FR 33935, 33465-66, May 19, 1980). The regulation states that any aspect which "unreasonably restricts, impedes or operates as a ban" is deemed inconsistent.

In the preamble discussing § 271.4(a), EPA explains the regulation as follows. The Agency stated that any aspect of the program which operates as a ban on the interstate movemnent of hazardous waste is automatically inconsistent. The Agency noted that this position was supported by a court decision, *City of Philadelphia v. New Jersey*, 437 U.S. 617 (1978), which held unconstitutional a statute banning transportation of certain wastes into the State for disposal because it violated the commerce clause of the Constitution. (This discussion is consistent with that in the preamble to the proposed regulation (44 FR 34259, June 14, 1979).)

EPA did not discuss what criteria it would apply in determining whether State programs unreasonably restrict or impede the free movement of hazardous waste. However, it is clear from the regulation that EPA intended "unreasonable restrictions or impediments" to render State programs inconsistent. The question of whether a State provision unreasonably restricts or impedes the free movement of hazardous waste did not arise in any final decision to grant RCRA final authorization until South Carolina's amended statute raised this issue.

B. The Agency's Tentative Decision on South Carolina Authorization

As noted above, EPA tentatively concluded that the South Carolina statute did not render the State program inconsistent under 40 CFR 271.4(a). In reaching this conclusion, the Agency considered all available facts. It appeared reasonably clear from the face of the statute that the fee schedule was not a ban and that it did not operate as a ban. The evidence before the Agency did not indicate that the fee schedule had significantly affected the flow of hazardous waste into the State. However, because the amended statute was a potentially significant change to the State program which might affect authorization under 40 CFR 271.4, the Agency solicited comment on whether the fee schedule unreasonably restricts or impedes the flow of hazardous waste into South Carolina.

C. Public Comment

Public comment, with one exception, supported EPA authorization of the State program. Several commenters did not address the question of the fee schedules but generally stated that South Carolina's RCRA program was supported by adequate legal authority and staffing and therefore deserved authorization. The only land disposal facility in South Carolina known to the Agency to accept

out-of-State hazardous waste and to pay the fees at issue also generally supported authorization, but did not address the question raised by the fee schedule.

Several other commenters who favored authorization argued that the fee schedule was reasonable and justified. They provided a variety of rationales including that the higher fees were appropriate: (1) To discourage land disposal as it is environmentally the least desirable form of disposal, (2) to raise money that might be expended to address released from land disposal units, (3) to discourage land disposal and thereby conserve the State's limited land disposal resources, and (4) to supplement State funds for monitoring compliance at land disposal facilities accepting out-of-State wastes.

The State of South Carolina commented that the one land disposal facility in South Carolina which accepts out-of-State wastes charges $90.00 per ton for disposal. First, the State noted that the new fee differential of $5.00 per ton for out-of-State wastes represents but a small percentage of this charge. The State believed that this small amount would not discourage out-of-State generators from using the facility. Second, the State noted that during the period of July to September of 1984 there were 16,848 tons of out-of-State waste disposed at the facility. During the same period in 1985, when the new fee schedule was in place, there were 26,352 tons of out-of-State waste disposed. The State cited this increase as factual proof that the fee schedule has not had any adverse impact on the amount of waste imported into the State. The State reported that fees had been collected at both the $18.00 rate and at higher rates corresponding to the fees of the States from which the wastes were shipped. Third, the State noted that a fee differential, including rates equivalent to those charged in the shipping State, had existed for several years and that there has been a continuing increase in the volume of wastes imported into the State.

The Hazardous Waste Treatment Council was alone in opposing authorization for South Carolina. The Council did not dispute that the volume of imported waste had increased despite the higher fees. Rather, they believed that the fee schedule discriminates on its face against interstate commerce and therefore was an unconstitutional and unreasonable restriction on the free flow of waste. The Council argued that: (1) the disparity in fees rendered the program "inconsistent" under RCRA 3006(b) as it did not promote the essential uniformity among hazardous waste programs intended by Congress, (2) the disparity in favor of in-State wastes was unconstitutional and therefore was inconsistent under RCRA 3006(b) and an unreasonable restriction or impediment under § 271.4(a), and (3) discriminatory statutes will frustrate RCRA objectives for a national market for development of proper treatment and disposal practices.

The Council stated that in promulgating 40 CFR 271.4, EPA had adopted a constitutional test to determine what is an unreasonable restriction and impediment. Therefore, they argued that the unconstitutional statute violated § 271.4(a). They also argued that it would be too difficult to assess whether there is in fact a significant discrimination on a case-by-case basis.

EPA believes that these are the substantive comments relating to the fee schedule and the Agency's decision. These and other comments are addressed in this notice and in a separate comment and response document that is available from EPA Region IV (address listed at the front of this notice).

D. Application of §271.4(a) to South Carolina's Fee Schedule

EPA carefully evaluated the above comments in determining whether the South Carolina fee schedule was an unreasonable restriction or impediment to the free movement of hazardous waste.

The Agency has determined that in applying § 271.4(a) to State laws and regulations, EPA should look to whether the State provision in fact has or is likely to have a significant adverse effect on the follow of hazardous waste into or out of the State. Thus, the unreasonableness of the restriction or impediment under § 271.4(a) should be measured by the impact of likely impact on the actual flow of waste. In applying this test, EPA will look to all relevant factors. The Agency will primarily focus on any available evidence on the quantities of wastes that are imported and exported.

The Agency believes that this test is a reasonable interpretation of its regulation and does not conflict with section 3006 of RCRA. Section 271.4(a) does not by its terms prohibit any restrictions or impediments, only those that are unreasonable. Reasonable restrictions or impediments can logically include those that do not significantly decrease the flow of hazardous waste. Therefore, EPA does not agree that *any* disparity in treatment between in-State and out-of-State wastes is *per se* unreasonable. Contrary to the statement by the Hazardous Waste Treatment Council, the preamble adopting this regulation did not state that EPA was relying on the Constitutional test for impermissible restraints on interstate commerce as the basis for finding restrictions or impediments unreasonable. The Agency is not required to adopt the Constitutional test for impediments or restrictions in interpreting its own regulations, and declines to do so here.

EPA also believes that its interpretation of the regulation accords with RCRA. RCRA section 2006 requires EPA to approve State programs unless it finds they are; (1) Not equivalent, (2) not consistent, or (3) lacking adequate enforcement authority. To be equivalent, States must adopt a set of basic statutes and regulations that are equivalent to EPA's. In addition, States may adopt requirements which are more stringent or different than

EPA's authority. More stringent requirements are expressly permitted by RCRA section 3009. These requirements may have some adverse effect on interstate commerce. Different requirements are permissible if they are not inconsistent with the Federal program and approved State programs. Authorized States have adopted many State requirements that are unlike the requirements of other States and which, in some cases, have an effect on the flow of wastes. The Agency does not believe that the mere existence of differences or disparities in treatment makes State programs inconsistent *per se*. Congress expected that States would not have identical programs and recognized the importance of allowing States to experiment with different requirements. Congress gave EPA the authority to interpret the term "consistent"; the Agency has interpreted the term in § 271.4 to prevent unreasonable restrictions or impediments in authorized programs. Nothing in RCRA section 3006(b) or any other section of RCRA requires the Agency to adopt the Constitutional test as the test for consistency or unreasonable restrictions or impediments.

The Agency does not believe that higher fees for out-of-State wastes or other discriminatory practices should be encouraged. EPA is concerned that such fees may discourage wastes from going to the most appropriate facility for treatment or disposal.

However, it appears that South Carolina's fee schedule does not have a significant adverse effect on the flow of hazardous waste into or out of the State. All available evidence supports this conclusion. The fact that the fee differential is small in most cases indicates that the out-of-State fee probably will not restrict a significant volume of waste. Moreover, the fact that the volume of out-of-State wastes increased significantly after the higher fees were imposed suggests that there is not a significant adverse impact on the flow of wastes. The fees clearly do not operate as a ban in this case. In addition, some fees

were collected at the higher rate based on the fees of other States. Finally, the volume of wastes imported into the State has increased over the years despite a fee differential which included fees based on those in the State of origin. Although it is unknown how much more waste might have entered South Carolina if there were no fee differential, there is no information to suggests that a significant volume might be affected. The Agency disagrees that this test (which looks to the facts of each case) is too difficult to apply.

Several comments related to the reasons for the State's adoption of the fee schedule and one addressed the concern that discriminatory practices would frustrate RCRA objectives for a national market for proper treatment and disposal practices. EPA acknowledges that the State offered several reasons for the fee differential. However, the Agency believes that the reasons for the adoption of the fee or any purported benefits are not generally relevant to the question of reasonableness of the impediment or restriction. If a provision has little or no impact on the flow of wastes, EPA does not believe that the actual motives or benefits resulting from the provision should preclude authorization. EPA is also concerned that different provisions for in-State and out-of-State wastes may frustrate the best possible treatment and disposal of wastes. As noted above, RCRA intended that State programs be generally uniform for purposes of encouraging proper treatment and disposal and EPA has interpreted this consistency requirement to deny authorization where restrictions or impediments are unreasonable. It does not require EPA to deny authorization merely because in-State and out-of-State wastes are regulated somewhat differently by the State. In any event, there is no evidence that proper treatment or disposal is adversely affected by this statute; the volume of wastes into South Carolina has increased.

In applying this facts and circumstances test, EPA is aware that circumstances may change over time. The

Agency will therefore periodically reassess provisions which may unreasonably impede the flow of wastes, including this fee schedule of South Carolina. In addition, any provisions adopted by States seeking authorization and which impose or result in restrictions or impediments on the flow of wastes will be subjected to careful scrutiny. If an authorized State adopts restrictions or impediments that may affect the flow of hazardous wastes, EPA may find that such changes are significant revisions to the State's program and provide public notice and comment under § 271.21 on their potential impacts on interstate transportation of wastes. If the restrictions or impediments are found to be unreasonable, they would be grounds for withdrawal of the authorized program under § 271.22.

For the reasons discussed above, EPA has concluded that South Carolina's fee schedule is not an unreasonable impediment or restriction on the flow of waste into the State and that authorization is not precluded by § 271.4(a). Nevertheless, the Commissioner of the South Carolina Department of Health and Environmental Control has informed the Agency that he will recommend to the South Carolina Legislature that it repeal that aspect of the fee schedule which imposes higher fees based on rates charged by the State of origin. EPA supports this effort.

South Carolina is not authorized by the Federal government to operate the RCRA program on Indian lands and this authority will remain with EPA.

Final authorization is hereby granted to South Carolina to operate its hazardous waste management program in lieu of the Federal program subject to the limitation on its authority by the Hazardous and Solid Waste Amendments of 1984 (Pub. L. 98-616, November 8, 1984). South Carolina now has the responsibility for permitting treatment, storage, and disposal facilities within its bor-

ders and carrying out the other aspects of the RCRA program. South Carolina also has primary enforcement authority, although EPA retains the right to conduct inspections and make information requests under section 3007 of RCRA and to take enforcement action under sections 3008, 3013, and 7003 of RCRA.

Prior to the Hazardous and Solid Waste Amendments (HSWA) amending RCRA, a State with final authorization administered its hazardous waste program entirely in lieu of EPA. EPA's regulations no longer applied in the authorized State, and EPA could not issue permits for any facilities the State was authorized to permit.

Now, however, under section 3006(g) of RCRA, 42 U.S.C. 6226(g), the new Federal requirements and prohibitions imposed by the HSWA take effect in authorized States at the same time as they take effect in non-authorized States. EPA is directed to carry out those requirements and prohibitions, including the issuance of full or partial permits, in authorized States until the State is granted authorization to do so.

As a result of HSWA, there will be a dual State-Federal regulatory program in South Carolina. To the extent the authorized State program is unaffected by the HSWA, the State program will operate in lieu of the Federal program. EPA will administer and enforce the portions of the HSWA in South Carolina until the State receives authorization to do so. Among other things, this will entail the issuance of Federal RCRA permits for those areas in which the State is not yet authorized. Once the State is authorized to implement a HSWA requirement or prohibition, the State program in that area will operate in lieu of the Federal program. Until that time the State will assist EPA's implementation of the HSWA under a Cooperative Agreement.

Federal HSWA requirements that are more stringent than the State's program apply in South Carolina. Any State requirement that is more stringent than a Federal

HSWA provision also remains in effect. (South Carolina is not being authorized now for any requirement implementing the HSWA.)

EPA has published a Federal Register notice that explains in detail the HSWA and its effect on authorized States. Refer to 50 FR 2872-28755, July 15, 1985.

Compliance With Executive Order 12291

The Office of Management and Budget has exempted this rule from the requirements of section 3 of Executive Order 12291.

Certification Under the Regulatory Flexibility Act

Pursuant to the provisions of 5 U.S.C. 605(b), I hereby certify that this authorization will not have a significant economic impact on a substantial number of entities. This authorization effectively suspends the applicability of certain Federal regulations in favor of South Carolina's program, thereby eliminating duplicative requirements for handlers of hazardous waste in the State. It does not impose any new burdens on small entities. This rule, therefore, does not require a regulatory flexibility analysis.

List of Subjects in 40 CFR Part 271

Hazardous waste, Indian lands, Reporting and recordkeeping requirements, Waste treatment and disposal, Intergovernmental relations, Penalties, Confidential business information.

Authority: This notice is issued under the authority of sections 2002(a), 3006, and 7004(b) of the Solid Waste Disposal Act as amended 42 U.S.C. 6912(a), 6926, 6974(b), and EPA Delegation 8-7.

Dated: November 5, 1985.

Jack E. Ravan,
Regional Administrator.

APPENDIX I

[EPA Logo]

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
Washington, D.C. 20460

[Dec. 23, 1988]

The Administrator

MEMORANDUM

SUBJECT: Policy Regarding Hazardous Waste Management Capacity and RCRA Consistency Issues

To: Regional Administrators

In recent months we have focused on two parallel, but overlapping, issues in the hazardous waste management area. One issue has been the development of guidance for the State hazardous waste capacity assurance process called for by Section 104(c)(3) of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA). The other has been the issue of EPA's approach to State actions which may be inconsistent with the federal Resource Conservation and Recovery Act program.

This past June a task force on these RCRA consistency and CERCLA capacity issues presented their findings to me. In addition, we have now completed our guidance to the States for the CERCLA capacity assurance process. Based on an evaluation of the findings and guidance, I now want to present to you EPA's policy in the area of RCRA consistency and CERCLA capacity assurance.

First, we will rely on the CERCLA process as our primary vehicle for ensuring that States have adequate capacity to manage their hazardous wastes. As our CERCLA capacity guidance indicates, the States must provide EPA with a good knowledge of their current and

projected waste amounts and management practices, including correlation of imports and exports between States; description of waste minimization programs; and discussions of laws and regulations which may affect the state's ability to manage waste. EPA must approve these State assurances in order for EPA to provide Superfund remedial actions in a State after October 17, 1989.

Secondly, the Regions should use the procedures for withdrawal of authorized State RCRA programs in the case of failure to use the RCRA uniform manifest system, or for unreasonable restrictions on interstate waste movements. The CERCLA capacity assurance process should be used as an initial response to State actions which prohibit waste management within State boundaries without environmental justification. States may be able to resolve issues related to such actions themselves during the interstate discusssions that the CERCLA process will foster. The Regions should, therefore, decide whether to initiate proceedings to withdraw State RCRA programs for prohibitory actions after determining that the CERCLA process has proven ineffective.

I believe the above dual approach to be a positive one allowing us to work within the legal authority provided, and to assist States in developing needed waste management capacity.

/s/ Lee M. Thomas
LEE M. THOMAS

APPENDIX J

STATUTES, REGULATION AND EXECUTIVE ORDERS INVOLVED

STATUTES

(R299. H3326)

AN ACT TO AMEND THE CODE OF LAWS OF SOUTH CAROLINA, 1976, BY ADDING SECTIONS 44-56-35, 44-56-165, AND 44-56-205 SO AS TO AUTHORIZE THE DEPARTMENT OF HEALTH AND ENVIRONMENTAL CONTROL TO PROMULGATE REGULATIONS ESTABLISHING STANDARDS FOR THE LOCATION OF HAZARDOUS WASTE TREATMENT, STORAGE, AND DISPOSAL FACILITIES TO ENSURE LONG-TERM PROTECTION OF HUMAN HEALTH AND THE ENVIRONMENT, AND REQUIRE THAT ALL HAZARDOUS WASTE TREATMENT AND DISPOSAL FACILITIES IN THIS STATE SHALL GIVE PREFERENCE TO HAZARDOUS WASTE GENERATORS WITHIN THE STATE FOR TREATMENT AND DISPOSAL OF HAZARDOUS MATERIALS AT LICENSED FACILITIES IN THE STATE, TO DESIGNATE THAT A PORTION OF THE FEE IMPOSED UNDER SECTION 44-56-170(C) BE USED TO FUND HAZARDOUS WASTE REDUCTION AND MINIMIZATION ACTIONS OF THE DEPARTMENT AND TO ENFORCE BANS PROVIDED FOR IN SECTION 44-56-136(4), (5), AND (6): TO AMEND CHAPTER 56 OF TITLE 44 BY ADDING ARTICLE 2 SO AS TO PROVIDE THAT THE ENTITY PROVIDING FINANCIAL ASSISTANCE FOR A HAZARDOUS WASTE TREATMENT OR DISPOSAL FACILITY OR SITE MUST, UPON WRITTEN REQUEST OF THE DEPARTMENT, FURNISH THE DEPARTMENT INFORMA-

TION CONCERNING ITS FINANCIAL INTEGRITY, TO PROVIDE THAT THE DEPARTMENT MAY REQUIRE CERTAIN INFORMATION, TO AUTHORIZE THE DEPARTMENT TO REVIEW THE NATURE, EXTENT, AND SUFFICIENCY OF THE INFORMATION SUPPLIED, TO AUTHORIZE THE DEPARTMENT TO VERIFY THE INFORMATION WHICH IS FURNISHED; TO AMEND CHAPTER 56 OF TITLE 44 BY ADDING ARTICLE 9 SO AS TO CREATE THE HAZARDOUS WASTE MANAGEMENT RESEARCH FUND, TO PROVIDE THE PURPOSES OF THE FUND, TO SPECIFY THE PURPOSES FOR WHICH MONIES FROM THE FUND MAY BE EXPENDED. REQUIRE CERTAIN FEES TO BE REMITTED FOR CREDIT TO THE FUND: AUTHORIZE THE SOUTH CAROLINA UNIVERSITIES RESEARCH AND EDUCATION FOUNDATION TO EXPEND MONIES FROM THE FUND, REQUIRE ACCOUNTING OF MONIES SPENT BY THE FOUNDATION, TO CREATE A HAZARDOUS WASTE MANAGEMENT SELECT OVERSIGHT COMMITTEE, TO PROVIDE FOR ITS PURPOSES, RESPONSIBILITIES, AND MEMBERSHIP: TO AMEND SECTION 44-56-60. RELATING TO THE REQUIREMENTS FOR THE ISSUANCE OF A PERMIT FOR THE OPERATION, CONSTRUCTION, OR ALTERATION OF A HAZARDOUS WASTE TREATMENT, STORAGE, OR DISPOSAL FACILITY, SO AS TO REQUIRE EVIDENCE OF FINANCIAL ASSURANCE AS THE DEPARTMENT DETERMINES PRIOR TO THE ISSUANCE OF A PERMIT: TO AMEND SECTION 44-56-130, RELATING TO UNLAWFUL ACTS REGARDING HAZARDOUS WASTE, SO AS TO PROHIBIT THE TREATMENT, STORAGE, OR DISPOSAL OF HAZARDOUS WASTE IN THIS STATE GENERATED IN ANOTHER STATE WHICH PROHIBITS THE TREATMENT, STORAGE, OR DISPOSAL OF THAT SUBSTANCE WITHIN ITS OWN

BORDERS: TO AMEND SECTION 44-56-160, AS AMENDED, RELATING TO THE HAZARDOUS WASTE CONTINGENCY FUND, SO AS TO MAKE CORRECTIONS IN REFERENCES TO FEES LEVIED PURSUANT TO OTHER CODE SECTIONS: AND TO AMEND SECTION 44-56-170, RELATING TO HAZARDOUS WASTE CONTINGENCY FUND REPORTS, FEES, AND ADMINISTRATION OF THE HAZARDOUS WASTE CONTINGENCY FUND, SO AS TO INCREASE THE FEE IMPOSED ON HAZARDOUS WASTES GENERATED IN AND OUT OF THIS STATE.

Be it enacted by the General Assembly of the State of South Carolina:

* * * *

SECTION 6. Chapter 66 of Title 44 of the 1976 Code is amended by adding:

"Section 44-66-205. All hazardous waste treatment and disposal facilities in South Carolina shall give preference to hazardous waste generators within the State of South Carolina for treatment and disposal of hazardous materials at licensed facilities in the State."

* * * *

SECTION 9. Section 44-66-130 of the 1976 Code is amended by adding:

"(4) It is unlawful for any person who owns or operates a waste treatment facility within this State to accept any hazardous waste generated in any jurisdiction which prohibits by law the treatment of that hazardous waste within that jurisdiction or which has not entered into an interstate or regional agreement for the safe treatment of hazardous waste pursuant to the federal Comprehensive Environmental Response, Compensation and Liability Act. Written documentation demonstrating compliance with this item must be submitted to the department before the transportation of any hazardous waste into the State for treatment.

(5) It is unlawful for any person who owns or operates a waste storage facility within this State to accept any hazardous waste generated in any jurisdiction which prohibits by law the storage of that hazardous waste within that jurisdiction or which has not entered into an interstate or regional agreement for the safe storage of hazardous waste pursuant to the federal Comprehensive Environmental Response, Compensation and Liability Act. Written documentation demonstrating compliance with this item must be submitted to the department before the transportation of any hazardous waste into the State for storage.

(6) It is unlawful for any person who owns or operates a waste disposal facility within this State to accept any hazardous waste generated in any jurisdiction which prohibits by law the disposal of that hazardous waste within that jurisdiction or which has not entered into an interstate or regional agreement for the safe disposal of hazardous waste pursuant to the federal Comprehensive Environmental Response, Compensation and Liability Act. Written documentation demonstrating compliance with this item must be submitted to the department before the transportation of any hazardous waste into the State for disposal."

* * * *

In the Senate House the 14th day of June
In the Year of Our Lord One Thousand Nine Hundred and Eighty-Nine.

Nick A. Theodore,
President of the Senate

Robert J. Sheheen,
Speaker of the House of Representatives

Approved the 20th day of June, 1989.

Carroll A. Campbell, Jr.,
Governor

(R729, H3169)

AN ACT TO AMEND THE CODE OF LAWS OF SOUTH CAROLINA, 1976, BY ADDING SECTION 44-56-59 SO AS TO MAKE FINDINGS AND DECLARATIONS BY THE GENERAL ASSEMBLY WITH RESPECT TO THE DISPOSAL OF HAZARDOUS WASTE IN THIS STATE AND TO AMEND SECTION 44-56-60, AS AMENDED, RELATING TO THE REQUIREMENT FOR OBTAINING AND ISSUING PERMITS FOR HAZARDOUS WASTE TREATMENT, STORAGE, OR DISPOSAL, SO AS TO REQUIRE THE DEPARTMENT OF HEALTH AND ENVIRONMENTAL CONTROL TO EVALUATE ANNUALLY TECHNOLOGIES AND METHODS TO REDUCE THE VOLUME OF HAZARDOUS WASTE AND REPORT ITS RESULTS TO THE GENERAL ASSEMBLY BEFORE THE FIRST DAY OF FEBRUARY BEGINNING IN 1991, AND TO REDUCE OVER TWO YEARS THE AMOUNT OF HAZARDOUS WASTE THAT MAY BE DISPOSED OF ANNULLY BY BURIAL FROM ONE HUNDRED THIRTY-FIVE THOUSAND TONS TO ONE HUNDRED TEN THOUSAND TONS, TO AUTHORIZE THE COMMISSIONER OF THE DEPARTMENT OF HEALTH AND ENVIRONMENTAL CONTROL TO ALLOW LAND DISPOSAL IN EXCESS OF THE ANNUAL LIMIT UPON THE APPROPRIATE CERTIFICATION, TO REQUIRE THE OPERATOR OF A HAZARDOUS WASTE DISPOSAL FACILITY OR SITE TO RESERVE ANNUALLY CAPACITY TO DISPOSE OF SOUTH CAROLINA GENERATED HAZARDOUS WASTE AT LEAST EQUAL TO THE IN-STATE WASTE DISPOSED OF AT THAT SITE OR FACILITY IN THE PREVIOUS YEAR, AND TO PROVIDE EXCEPTIONS, AND TO PROHIBIT THE BURIAL IN A TWELVE-MONTH PERIOD IN THIS STATE OF MORE OUT-OF-STATE GENERATED HAZARDOUS WASTE THAN WAS BURIED IN THE PREVIOUS TWELVE MONTHS.

Be it enacted by the General Assembly of the State of South Carolina:

Findings

SECTION 1. Chapter 56, Title 44 of the 1976 Code is amended by adding:

"Section 44-56-59. (A) General Assembly finds:

(1) The existing commercial land disposal facility in South Carolina and available capacity in this State generally are limited resources;

(2) It is essential that the limited waste treatment and disposal capacity of the existing commercial facility and the State in general be preserved, ready and available to ensure that the needs of South Carolina are met first;

(3) The existing commercial land disposal facility as well as other hazardous waste treatment and disposal facilities must give preference to hazardous waste generators within the State for treatment and disposal of hazardous materials at licensed facilities in the State;

(4) The General Assembly and the Executive Branch have mandated restrictions on the importation of out-of-state wastes and on the capacity of existing hazardous waste landfills; and

(5) Reducing the amount of hazardous waste shipped to South Carolina commercial facilities will send a message to all states that South Carolina intends to reduce to the greatest extent possible the amount of hazardous waste treated and disposed of in this State.

(B) Based upon these findings, the General Assembly declares that:

(1) Landfilling is the least desirable method of managing hazardous waste and, in order to reduce potential risks to human health and the environment, reliance on landfilling must be reduced or eliminated when alternative

disposal methods which are technologically and economically feasible are reasonably available within the State, through regional agreements between states, or through other means; and

(2) As this State reduces its reliance on landfilling through its waste minimization practices and other means, the amount of hazardous waste being shipped into this State for landfilling from locations outside of the State should be reduced and eliminated also."

Hazardous waste

SECTION 2. Section 44-56-60(a) of the 1976 Code is amended to read:

"(a) (1) In order to provide the General Assembly with the information it needs to accomplish the above goals, the Department of Health and Environmental Control shall evaluate annually the effects of new and existing waste management technologies, alternate methods of storage or disposal, recycling, incineration, waste minimization laws and practices, and other factors that tend to reduce the volume of hazardous waste. The results of the department's evaluation must be reported to the General Assembly not later than February first of each year, beginning in 1991, in a form that will permit the General Assembly to determine whether or not hazardous waste landfill capacity in this State should be reduced.

(2) No person may construct, substantially alter, or operate a hazardous waste treatment, storage, or disposal facility or site, nor may a person transport, store, treat, or dispose of hazardous waste without first obtaining a permit from the department for the facility, site, or activity. Beginning July 1, 1990, permitted hazardous waste disposal sites are restricted to a rate of land disposal by burial not to exceed one hundred twenty thousand tons of hazardous waste for the twelve-month period ending July 1, 1991. On July 1, 1991, permitted hazard-

ous waste disposal sites are restricted to a rate of land disposal by burial not to exceed one hundred ten thousand tons of hazardous waste for each twelve-month period thereafter within the permitted area of the site.

(3) During a twelve-month period, the Commissioner may allow land disposal by burial in excess of the limitation, upon certification of the department that:

(A) disposal by land burial from a particular site in South Carolina is necessary to protect the health and safety of the people of this State; or

(B) at least one hundred ten thousand tons of hazardous waste disposed of by land burial in this State during the twelve-month period was generated in South Carolina.

During each twelve-month period, operating a hazardous waste disposal facility or site shall reserve at least the same capacity to dispose of hazardous waste generated in South Carolina that was disposed of by burial at that facility or site during the previous year excluding capacity that was used to dispose of hazardous waste pursuant to subitem (A). No more hazardous waste from out of state shall be buried in South Carolina than was buried in the previous twelve-month period.

Certification must be issued to the party seeking to use land disposal of the waste, and the certification must be presented to the operator of the facility at the time of disposal. The facility shall submit this certification with its regular report to the department of permitted activity at the disposal site."

Time effective

SECTION 3. This act takes effect upon approval by the Governor.

In the Senate House the 7th day of June
In the Year of Our Lord One Thousand Nine Hundred Ninety.

Nick A. Theodore,
President of the Senate

Robert J. Sheheen,
Speaker of the House of Representatives

Approved the 13th day of June, 1990.

Carroll A. Campbell, Jr.,
Governor

with the Union-Newberry County line, thence northeast along said highway to its junction with Broad River, thence south along said river to its junction with the Newberry County line, thence west and north along said county line to the point of beginning.

37. Williamsburg County. The entire county.

B. Suppressive areas. None.

DEPARTMENT OF HEALTH AND ENVIRONMENTAL CONTROL
CHAPTER 61

Statutory Authority: S.C. Code Ann. 44-56-10 *et seq.*

61-99. Hazardous Waste Management Planning

I. Purpose and Scope:

A) Each State is obligated to certify to the President of the United States that it will have waste disposal capacity sufficient for the next twenty (20) years. Because sites suitable for proper disposal of hazardous waste are limited, applicants for permits to establish or expand hazardous waste management facilities shall demonstrate to the Department the need for such new or expanded facilities in order to:

1. ensure that the needs of South Carolina industries and other necessary users are met, and to prevent dangerous and illegal disposal practices;

2. prevent excess capacity which may become technologically obsolete and/or unnecessary as changes occur in production practices, methods of treatment, utilization of waste materials, and other waste minimization efforts;

3. minimize the burden placed on State resources through activities associated with the permitting, operation, and supervision of such facilities; and

4. minimize potential adverse environmental and publict health effects.

B) This regulation shall apply to applicants for permits to establish or expand facilities for treatment, storage, or disposal of hazardous waste; *provided,* however, that it shall not apply to facilities operated by enterprises for the treatment, storage, or disposal of hazardous waste at the site of generation; and *provided* further, that it shall not apply to facilities which apply to the Department for a permit to continue existing activities with existing limitations pursuant to R.61-79, Part 270.10 (e)(4), (i.e., a "Part B" permit); and *provided* further, that it shall not apply to the hazardous waste management activities at those manufacturing facilities which lawfully burn hazardous waste for energy recovery up to the normal rate of manufacturing production, or who lawfully use or reuse the hazardous waste is a safe and environmentally acceptable substitute for raw materials; and provided further that manufacturing facilities who burn hazardous waste for energy recovery or who use or reuse hazardous waste shall demonstrate that they derive the majority of profits from the product produced.

C) No hazardous waste facilities subject to this regulation shall be permitted until the demonstration of need is approved by the Department.

II. Definitions:

A) "Available capacity" means permitted capacity available at hazardous waste management facilities that will accept off-site generated hazardous waste.

B) "Expand or Expansion" means any increase in the permitted capacity of the facility, any change in the types of waste received by the facility, or any increase in the

volume or rate of waste permitted to be managed by a facility.

C) "Hazardous Waste" means a hazardous waste as defined in R.61-79.261 of the South Carolina Hazardous Waste Management Regulations.

D) "Hazardous Waste Management Facility" means any facility for the treatment, storage, or disposal of hazardous waste as defined in R.61-79.

III. Demonstration of Need Requirements for Hazardous Waste:

A) Each application for a permit to construct a new facility or expand an existing facility shall be accompanied by a demonstration of need, which shall be of such form and content as the Department may specify.

B) The demonstration of need shall be specific for each hazardous waste to be managed at the facility and shall include, but not be limited to:

1. documentation of the remaining available capacity at existing hazardous waste management facilities within the State of South Carolina;

2. documentation of the current volume generated within the state which will require off-site management and an annual projection for each of the next five (5) years, based on reliable data; and

3. a description of any additional factors, such as geographical or physical barriers which may limit transportation, or the existence of additional available capacity outside of the State of South Carolina which may serve the projected need.

C) For purposes of demonstrating need, Hazardous Waste generated outside the State of South Carolina shall not be included.

IV. Appeals:

An appeal from denial of a permit for failure to demonstrate that a need exists shall be deemed a "Contested Case" as defined in S. C. Code Ann. 1-23-310(2).

V. Severability:

Should any section, paragraph, sentence, clause or phrase of this regulation be declared unconstitutional or invalid for any reason, the remainder of this regulation shall not be affected thereby.

EXECUTIVE ORDERS

[Filed Jul. 6, 1989]

EXECUTIVE DEPARTMENT

[State Logo]

State of South Carolina

EXECUTIVE ORDER NO. 89-25

WHEREAS, the State of South Carolina is responsible for promoting and preserving the environment of the State and for protecting the public health and welfare; and

WHEREAS, preservation of the environment and protection of the public health require prevention or abatement of nuisances used by uncontrolled disposal of hazardous waste; and

WHEREAS, for the foreseeable future, generation of hazardous waste is a necessary consequence of industrial activity and the use of consumer goods; and

WHEREAS, all states generate hazardous waste and receive the benefits of the economic activity attendant thereto; and

WHEREAS, prudent management of hazardous waste includes waste minimization, waste reduction, recycling, and alternative forms of disposal, including incineration, chemical treatment, and land disposal; and

WHEREAS, the public health and the quality of the environment is best protected by treating hazardous waste before disposal so as to minimize its hazardous characteristics and to reduce its volume; and

WHEREAS, each treatment or disposal facility creates a burden on the state and locality in which it is situated, in that the state and locality must provide additional resources to support operations of such a facility and will

be subjected to ongoing operations as well as to the residue; and

WHEREAS, based on volume of hazardous material currently being treated or disposed of at facilities located in South Carolina, this State bears a disproportionate fraction of the burden of hazardous waste management; and

WHEREAS, the Comprehensive Environmental Response, Compensation and Liability Act of 1980, as amended (CERCLA), requires that each state certify to the President by October 17, 1989, that it will be able to manage hazardous wastes generated within its borders for twenty years; and

WHEREAS, after October 17, 1989, no CERCLA remedial actions can be undertaken unless the state first enters into a contract or cooperative agreement with the Environmental Protection Agency providing such certification; and

WHEREAS, the Environmental Protection Agency has issued guidance to states which specifies what constitutes an acceptable Capacity Assurance Plan, one component of which is a requirement that states which plan to rely on exportation of waste streams as a waste management strategy, obtain assurance from importing states in the form of interstate agreements that waste will be accepted for treatment and disposal; and

WHEREAS, South Carolina is the location of a land disposal facility for hazardous waste, the capacity of which is fixed by S. C. Code Ann. § 44-56-60(a) at 135,000 tons per year; and

WHEREAS, South Carolina is the location of two commercial incinerators which have capacities in excess of the needs of South Carolina generators; and

WHEREAS, S. C. Code Ann. § 44-56-205 (1989) requires that all hazardous waste treatment and disposal

facilities in South Carolina give preference to South Carolina generators; and

WHEREAS, an interstate planning process is necessary to insure the orderly development of treatment and disposal capacity which distributes the burdens proportionally to the benefits; and

WHEREAS, South Carolina has taken part in a regional planning meeting at which proposals for sharing responsibility for development of treatment capacity sufficient to serve the needs of the region were discussed; and

WHEREAS, the existing land disposal facility in South Carolina is a limited resource which may be an essential element in the hazardous waste management plans of many states; and

WHEREAS, planning is essential to insure that waste treatment and disposal capacity will be ready and available to serve the needs of South Carolina and other states in the region.

NOW, THEREF0RE, I do hereby order that effective July 1, 1989, hazardous waste disposal facilities operating in South Carolina shall reserve 54,000 tons per year of the statutory maximum of 135,000 tons per year for South Carolina generated hazardous waste; provided, further, that of the remaining 81,000 tons, a hazardous waste disposal facility may not receive more than 35,000 tons per year from any one state, of which a hazardous waste disposal facility may not receive more than 10,000 tons from any state in any calendar quarter, not to exceed the annual cap of 35,000 tons. And provided, further, that during the twelve calendar months following July 1, 1989, 27,000 tons capacity shall be reserved for disposal of material which is the by-product of waste pretreatment to reduce its hazardous characteristics and its volume; during the subsequent two years, the amount so reserved shall increase by 6,750 tons each year.

If, after the third quarter of any calendar year, and upon demonstration to the S. C. Department of Health and Environmental Control (the "Department") that the capacity so reserved for South Carolina generators will not be required in the remainder of the year, the excess capacity may be offered to other generators. In reviewing such demonstrations, the Department is hereby directed to consider past utilization of the site and anticipated South Carolina needs, including but not limited to waste generated from State and federal Superfund cleanup activities.

Given under my hand and the Great Seal of the State of South Carolina, this 6th day of July, 1989.

/s/ Carroll A. Campbell, Jr.
CARROLL A. CAMPBELL, JR.
Governor

ATTEST:

/s/ John T. Campbell
JOHN T. CAMPBELL
Secretary of State

[Filed Apr. 3, 1989]

EXECUTIVE DEPARTMENT

[State Logo]

STATE OF SOUTH CAROLINA

EXECUTIVE ORDER NO. 89-17

WHEREAS, the State of South Carolina is responsible for promoting and preserving an environment that is conducive to public health and welfare, and preventing the creation of nuisances from illegal dumping of hazardous waste; and

WHEREAS, South Carolina is promoting waste minimization, waste reduction, recycling, incineration, and chemical treatment as alternatives to land filling; and

WHEREAS, the volume of hazardous waste disposed of in South Carolina is disproportionately out-of-state waste; and

WHEREAS, other states have failed to act responsibly in disposing of their own hazardous waste and have implemented by statute, regulations or administrative action, barriers and restraints against the disposal of hazardous waste within their own borders; and

WHEREAS, other states are not working cooperatively to solve the regional treatment and disposal problems of hazardous waste and should be encouraged to cooperate in a regional approach to hazardous waste treatment and disposal; and

WHEREAS, the citizens of South Carolina are concerned about the hazardous waste burden placed upon South Carolina which threatens our environment and the mental well-being of our citizens; and

WHEREAS, South Carolina has numerous hazardous waste sites on the National Priority list for clean-up with an estimated 800,000 tons of waste requiring remedial action; and

WHEREAS, the State of South Carolina has established a comprehensive Management program for the generation, storage, treatment and disposal of hazardous waste; and

WHEREAS, this program is administered by the South Carolina Department of Health and Environmental Control under authority of the South Carolina Hazardous Waste Management Act under Section 44-56-10 et. seq., *Code of Laws of South Carolina, 1976* (Cum. Supp. 1987); and

WHEREAS, the State of South Carolina was authorized on November 8, 1985, to fully administer its hazardous waste management program; and

WHEREAS, the purpose of this program is to protect the health of the citizens of South Carolina and the environment of the State of South Carolina by providing a "cradle to grave" approach to the management of hazardous waste; and

WHEREAS, in order to assume the safe handling and disposal of hazardous waste, the South Carolina Hazardous Waste Management Act governs all persons who handle such waste including those who create the waste (generators); those who ship waste from its point of origin to elsewhere (transporter) and those who own or operate hazardous waste management facilities (treatment, storage and disposal facilities); and

WHEREAS, it is a requirement on all states under Section 104(c)(9) of the Comprehensive Environmental Response, Compensation, and Liability Act, (CERCLA), as amended, to demonstrate by October 17, 1989, that a state has adequate capacity to manage the hazardous

wastes generated by the state and expected to be generated in the state for the next twenty years; and

WHEREAS, after October 17, 1989, no CERCLA remedial actions can be taken in that state unless the state first enters into a contract or cooperative agreement with the Environmental Protection Agency providing such assurances; and

WHEREAS, the Environmental Protection Agency has issued guidance to states which specifies what constitutes an acceptable Capacity Assurance Plan, one component of which is a requirement that states which plan to rely on exportation of waste streams as a waste management strategy, obtain assurance from importing states in the form of interstate agreements that waste will be accepted for treatment and disposal; and

WHEREAS, the State of South Carolina can and will demonstrate adequate capacity to manage the hazardous wastes generated in this state for the prescribed period; and

WHEREAS, it is a requirement of the Resources, Conservation and Recovery Act and the regulations promulgated pursuant thereto, specifically 40 C.F.R. Section 271.4, that states must demonstrate consistency with federal program requirements in order to administer their own hazardous waste management programs; and

WHEREAS, the State of South Carolina has an approved and consistent program for hazardous waste management; and

WHEREAS, any state law or state program which has no basis in human health or environmental protection and which acts as a prohibition on the treatment, storage or disposal of hazardous waste in that state may be deemed to cause that state to have an inconsistent program and lose authority to administer a hazardous waste management program; and

WHEREAS, the State of South Carolina has worked diligently with South Carolina industry to enhance economic development by providing appropriate and environmentally safe storage, treatment and disposal facilities within its borders while certain states have arbitrarily obstructed the treatment, storage or disposal of hazardous waste within their borders inconsistent with federal law; and

WHEREAS, the Environmental Protection Agency has failed to follow their own requirements and withdraw program authority from these states; and

WHEREAS, this failure to act and the failure of certain other states to meet their responsibilities in the management of hazardous waste have caused an unfair burden on the State of South Carolina.

NOW, THEREFORE, I do hereby order that effective March 1, 1989, no person who owns or operates a disposal facility in this state shall accept a hazardous waste which is generated in another state and is banned or prohibited for disposal by any statute, regulation or administrative decision of that state. The State will not enter into any interstate agreements in which South Carolina is to be the importing state with states which do not meet the following criteria:

1) (a) Effective December 31, 1990, any state which does not meet the site designation requirements of the Comprehensive Environmental Response, Compensation and Liability Act, as amended by the Superfund Amendments and Reauthorization Act, for a site or sites within its borders which is or are capable of treating and disposing of hazardous waste generated within its borders;

(b) Between January 1, 1991, and December 31, 1993, such states may be exempted from the ban provided that a permit application for a waste treatment or disposal

facility has been submitted to the appropriate agency and is being pursued;

(c) Effective December 31, 1993, no state shall be exempted from the ban unless such instate facilities shall be operational.

2) In the event that South Carolina enters into an interstate agreement pursuant to EPA guidance with a state which subsequently fails to comply with the requirements of the Capacity Assurance Plan guidance, or fails to comply with one or more of the criteria set forth above, South Carolina will take the appropriate steps to withdraw from the interstate agreement and to notify the Environmental Protection Agency that South Carolina considers the State in question to have violated the Congressional requirements established in CERCLA § 104(c)(9). Under the terms of this Executive Order, waste from generators located in such states will be barred from access to treatment or disposal facilities located in South Carolina.

All hazardous waste treatment and disposal facilities in South Carolina shall give preference to hazardous waste generators within the State of South Carolina for treatment and disposal of hazardous materials at licensed facilities within the State. The State of South Carolina shall meet or exceed the pretreatment and land ban criteria established by the EPA which require all hazardous waste to be pretreated by either chemical treatment, incineration or such other form as necessary to detoxify as far as technically possible all wastes.

The Department of Health and Environmental Control is further instructed to accelerate its cleanup activities at the National Priority listed Superfund sites within South Carolina.

This Executive Order shall be interpreted to encourage a reasonable and cooperative approach toward hazardous

waste management within the southeast region and to encourage affected states and the Environmental Protection Agency to effectuate a comprehensive hazardous waste management program for the region;

The South Carolina Department of Health and Environmental Control is directed to ensure compliance with the provisions of this Order.

This Order rescinds Executive Order No. 89-03, dated January 18, 1989.

Given under my hand and the Great Seal of the State of South Carolina, this 3rd day of April, 1989.

/s/ Carroll A. Campbell, Jr.
CARROLL A. CAMPBELL, JR.
Governor

ATTEST:

/s/ John T. Campbell
JOHN T. CAMPBELL
Secretary of State

Supreme Court, U.S.
FILED
JAN 30 1997
CLERK

No. 96-1102

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

STATE OF SOUTH CAROLINA; DAVID M. BEASLEY, Governor of the State of South Carolina; DOUGLAS E. BRYANT, Commissioner of the South Carolina Department of Health and Environmental Control; SOUTH CAROLINA DEPARTMENT OF HEALTH AND ENVIRONMENTAL CONTROL; SOUTH CAROLINA BOARD OF HEALTH AND ENVIRONMENTAL CONTROL,

Petitioners,

v.

ENVIRONMENTAL TECHNOLOGY COUNCIL,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

RESPONSE IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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January 30, 1997

RESPONSE IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Sierra Club, Energy Research Foundation, Citizens for Clean Air and Water, Environmentalists, Inc., and Citizens Asking for a Safe Environment (CASE) (hereinafter "Sierra Club") were the initial Appellants in this case when it was heard by the United States Court of Appeals for the Fourth Circuit. Sierra Club intervened in this case to support one of the challenged statutes and the challenged regulation. Sierra Club supports the Petition for Writ of Certiorari in this matter for the following reasons:

1. The first question presented is an important issue of federal law relating to the regulation of hazardous waste. The issue presented was identified but not addressed in the Court's opinion in *Chemical Waste Management v. Hunt*, 504 U.S. 334, 346 n.9 (1992): whether the RCRA consistency standard and federal approval under that standard displace the dormant Commerce Clause. *See also, C & A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383, 409-410 (1994) (O'Connor, J., concurring).

2. The second question presented — concerning the validity of South Carolina's neutral cap on disposal of hazardous waste by burial and the regulation requiring a demonstration of need for new treatment facilities — addresses the issues which led Sierra Club to intervene.

The neutral cap at issue is an amendment to reduce South Carolina's existing cap on the amount of hazardous waste that may be buried annually in permitted landfills — the original cap was 135,000 tons/year, and the amendment reduced the cap to 120,000 tons/year and then 110,000 tons/year. The District Court and Court of Appeals granted summary judgment concluding that the new cap is not evenhanded, and citing *West Lynn Creamery Inc. v. Healy*, 512 U.S. 186 (1994), appeared to make and rely upon factual findings which are improper at the summary judgment stage. Sierra Club believes that the lower courts have misapplied this Court's *West Lynn* decision and erroneously granted summary judgment.

South Carolina's "needs regulation" simply requires an assessment of in-state need for hazardous waste treatment and disposal when permitting new treatment and disposal capacity. The regulation merely ensures that hazardous waste facilities bear a nexus to some hazardous waste generated within the state. It does nothing to prevent new permitted capacity from being devoted entirely to out of state waste. Again, the lower courts granted summary judgment with no factual record to support the conclusion that the regulation is discriminatory in its application.

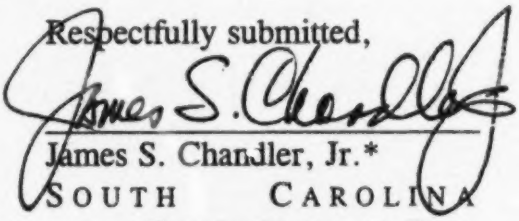
The in-state need requirement is in fact no different from the type of evenhanded, nondiscriminatory limitation on the amount of waste disposed of that does not discriminate on the basis of the waste's origin which is described with

approval in *Chemical Waste Management, supra, Fort Gratiot Landfill v. Michigan Department of Natural Resources*, 504 U.S. 353 (1992), and *Philadelphia v. New Jersey*, 437 U.S. 617 (1978). Neither the District Court nor the Fourth Circuit explained how the needs requirement is different from a neutral cap. This important issue warrants review by the Supreme Court.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,



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No. 96-1102

IN THE
Supreme Court of the United States
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STATE OF SOUTH CAROLINA; DAVID M. BEASLEY, Governor of the State of South Carolina; DOUGLAS E. BRYANT, Commissioner of the South Carolina Department of Health and Environmental Control; SOUTH CAROLINA DEPARTMENT OF HEALTH AND ENVIRONMENTAL CONTROL; SOUTH CAROLINA BOARD OF HEALTH AND ENVIRONMENTAL CONTROL,
Petitioners,

v.

ENVIRONMENTAL TECHNOLOGY COUNCIL, on behalf of itself and its members,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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RESPONDENT'S BRIEF IN OPPOSITION

STATEMENT OF THE CASE

Background And The Laws In Question

At issue in the Petition are a series of South Carolina laws, executive orders and regulations that purposefully discriminate against interstate commerce. The conceded objective of those laws was to erect barriers to the treatment, storage and disposal of hazardous wastes from *other* states at South Carolina disposal and treatment facilities.[1] Those laws, executive orders and regulations, which together comprise a comprehensive effort to discriminate against interstate waste (*see* Pet. App. 33a) fall into three categories:

(1) *Blacklisting/Embargo and Preference Laws*: These laws purported to ban treatment facilities located in the state from receiving wastes from customers located in other states that, in South Carolina's view, are not adequately fulfilling their responsibilities under federal law and expressly require treatment and disposal facilities in South Carolina to provide "favored" treatment to wastes generated in South Carolina; [2]

(2) *Quotas*: These laws purported to place an absolute limit or cap on the volume of wastes that

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[1] The facility most affected by these laws is the Pinewood hazardous waste management facility, located in Sumter County, South Carolina.

[2] Sections 5 and 9 of 1989 South Carolina Act No. 196, adding S.C. Code Ann. § 44-56-205 and amending § 44-56-130, and South Carolina Exec. Order 89-17. *See* Pet. App. 8a, 125a-28a, 142a-47a. Respondent notes that the Petition Appendix improperly refers to "SECTION *6*" and "Chapter *66*." See Pet. App. 127a. The correct reference is to "SECTION *5*" and "Chapter *56*." *See* Pet. App. 33a, 125a-26a. In addition, the Appendix improperly refers to Section 9 as amending "Section 44-*66*-130" when it is actually amending Section 44-*56*-130. *See* Pet. App. 33a, 126a, 127a.

South Carolina treatment and disposal facilities may accept from customers located in any state other than South Carolina, while not imposing similar quotas on their South Carolina customers; [3]

(3) *Facility Permit Requirements*: These requirements purported to bar construction or expansion of any treatment and disposal facilities where such expansion will, in part, serve to treat or dispose of wastes that are generated by present or future customers *outside* the State.[4]

This Action

In June 1996, in response to the series of statutes, executive orders and regulations outlined above, Respondent Environmental Technology Council, on behalf of itself and its members,[5] brought this action in the United States District Court for the District of South Carolina. On January 11, 1991, Judge Perry granted Environmental Technology's motion for a preliminary injunction, finding a strong likelihood of success on the merits as to Environmental Technology's claims that South Carolina's laws facially discriminated against out-of-state hazardous waste and thereby violated the Commerce Clause (U.S. Const. art. I, § 8, cl. 3). *See* Pet. App. 102a.[6]

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[3] 1990 South Carolina Act No. 590, adding S.C. Code Ann. § 44-56-59 and amending § 44-56-60, and South Carolina Exec. Order 89-25. *See* Pet. App. 8a-9a, 129a-33a, 138a-41a.

[4] South Carolina Department of Health and Environmental Control Regulation 61-99. *See* Pet. App. 9a, 134a-37a.

[5] Environmental Technology Council (formerly the Hazardous Waste Treatment Council) is a non-profit association of companies that provide permitted commercial services for the recycling, treatment, storage and disposal of hazardous and non-hazardous wastes. The Pinewood facility is operated by Laidlaw Environmental Services, Inc. of Columbia, South Carolina.

[6] Respondent also alleged that South Carolina had violated the Privileges and Immunities Clause, U.S. Const. art. IV, § 2, cl. 1, the Supremacy Clause, U.S. Const. art. VI, cl. 2, and 42 U.S.C. § 1983 (1994).

On September 20, 1991, the Fourth Circuit affirmed the preliminary injunction virtually in all respects, agreeing that South Carolina's statutes and executive orders "appear facially to discriminate against out-of-state hazardous waste." Pet. App. 68a-69a. In the course of that appeal, the United States filed a brief as *amicus curiae* addressing the Environmental Protection Agency's ("EPA") actions and supporting Environmental Technology's position. *See generally* Brief for the United States as *Amicus Curiae* in Support of Appellee (hereinafter referred to as "U.S. Amicus Brief").[7]

On April 13, 1995, the district court granted Respondent's motion for summary judgment. The court reaffirmed that the statutes and regulations in question were facially discriminatory and thus subject to the " 'virtually *per se* rule of invalidity' " established by this Court. Pet. App. 32a. It held that Petitioners had failed to provide *any* evidence of any non-discriminatory " 'legitimate local purpose' or the 'absence of nondiscriminatory alternatives' " to support the facially discriminatory laws. Pet. App. 33a. The district court also held that referral to EPA under the primary jurisdiction doctrine was "not appropriate." Pet. App. 30a.

The United States Court of Appeals for the Fourth Circuit again affirmed. *See* Pet. App. 4a. Referring to its earlier opinion, and applying well-established principles set forth by this Court, the court of appeals noted that where a state law facially discriminates against interstate commerce, a " 'virtually *per se* rule of invalidity' " applies. Pet. App. 18a. Thus, a form of strict scrutiny is invoked under which a State's effort to discriminate against interstate commerce may be justified only upon a showing that the discriminatory law or restriction is " 'justified by a valid factor unrelated to economic protectionism.' " Pet. App. 18a-19a (citation omitted).

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[7] Eleven copies of that brief have been lodged with the Clerk of this Court.

The court of appeals noted that "most of the provisions at issue here are not close calls" because

> they clearly discriminate against out-of-state waste either facially, in effect, or in purpose. The black-listing provision, floor for in-state wastes, ceiling for out-of-state wastes, and quotas for out-of-state and in-state wastes facially discriminate against out-of-state wastes by refusing admittance into South Carolina of certain wastes and giving express preference over South Carolina capacity to in-state wastes.

Pet. App. 19a. The various objectives asserted by the State to support these laws did not justify the *differential treatment* of in-state and out-of-state wastes. Pet. App. 22a. "None of the affidavits . . . submitted even purport to justify . . . discriminatory treatment of out-of-state wastes." *Id.*

With respect to two other requirements—(1) the "cap" or limit on total waste disposal and (2) the "needs" requirement for construction or expansion of facilities—the court of appeals noted that such laws might withstand scrutiny if structured to apply evenhandedly to in-state and out-of-state interests. Pet. App. 23a. However, the court noted that South Carolina had structured the provisions at issue here expressly to discriminate against interstate commerce. Pet. App. 23a-25a.

Thus, while an "evenhanded cap or limit [that] uniformly burdens both in-state and out-of-state interests" likely would survive a constitutional challenge, the cap set by South Carolina was not evenhanded: The cap could readily be circumvented on behalf of in-state interests, but remained absolute for out-of-state wastes. Pet. App. 23a. Moreover, the court noted that under South Carolina law, the non-discriminatory aspect of the limit—the disposal ceiling itself—could not be severed from the various discriminatory provisions tied to that ceiling. Pet. App. 24a n.21.

Similarly, the "needs" requirement had been structured by South Carolina "to prohibit facilities from expanding

to meet out-of-state needs, but to allow expansion to meet in-state needs." Pet. App. 25a. Thus, this provision also was facially discriminatory and subject to the *per se* test of invalidity. *Id.*

As had the district court, the Fourth Circuit rejected Petitioners' theory that Congress' delegation to EPA of the power to authorize or approve state programs in connection with the Resource Conservation and Recovery Act of 1976 ("RCRA"), as amended, *see* 42 U.S.C. §§ 6901-92k (1994 & Supp. I 1995), the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 ("CERCLA"), as amended, *see* 42 U.S.C. §§ 9601-75 (1994 & Supp. I 1995), and the Superfund Amendments and Reauthorization Act of 1986 ("SARA"), Pub. L. No. 99-499, 100 Stat. 1613 (1986), displaced constitutional requirements or authorized the States to discriminate against interstate commerce. Pet. App. 14a-15a. Applying the standard set forth by this Court, the Fourth Circuit reaffirmed its earlier ruling that these statutes do not contain or reflect an "unmistakably clear" intention of Congress to allow state discrimination against interstate commerce. Pet. App. 13a-14a. It noted as well that EPA's regulations did not resolve any constitutional question and that EPA had never expressly approved any of the South Carolina laws at issue. Pet. App. 14a-15a, 17a.

Finally, the Fourth Circuit rejected Petitioners' argument that the primary jurisdiction doctrine governed, holding that "[t]he EPA's special expertise is not needed to decide a question of law in a constitutional matter." Pet. App. 27a.

The petition followed.

REASONS FOR DENYING THE WRIT

THIS CASE PRESENTS NO ISSUE UPON WHICH THE CIRCUIT COURTS HAVE DISAGREED AND DOES NOT RAISE SUBSTANTIAL ISSUES WARRANTING THIS COURT'S REVIEW

The court of appeals was able to draw upon an unusual wealth of recent precedent and clear direction from this Court in resolving the issues presented by this case. Many of the historically controlling principles have been reaffirmed and elaborated in very recent decisions of this Court, including decisions specifically addressing interstate commerce in waste materials. Indeed, many of these decisions were rendered after the South Carolina laws at issue were initially enacted and after this case was initially filed. The court of appeals' initial decision affirming the grant of a preliminary injunction, Pet. App. 50a *et seq.*, thus relied upon historic principles that have *since* been restated by this Court in cases such as *C & A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383, 392-95 (1994), and *Chemical Waste Management, Inc. v. Hunt*, 504 U.S. 334, 340-45 & n.3 (1992). *See also Oregon Waste Sys., Inc. v. Department of Envtl. Quality*, 511 U.S. 93, 98-102 (1994); *Fort Gratiot Sanitary Landfill, Inc. v. Michigan Dep't of Natural Resources*, 504 U.S. 353, 359-61 (1992); *Wyoming v. Oklahoma*, 502 U.S. 437, 454-59 (1992); *New Energy Co. of Ind. v. Limbach*, 486 U.S. 269, 273-78 (1988); *Maine v. Taylor*, 477 U.S. 131, 137-40 (1986); *Sporhase v. Nebraska*, 458 U.S. 941, 954-59 (1982); *City of Philadelphia v. New Jersey*, 437 U.S. 617, 623-29 (1978). The Fourth Circuit did not express any difficulty understanding the Court's precedents on these issues. Petitioners nowhere suggest a conflict in the circuits.

Specifically, this Court has firmly established that the Constitution contemplates the free flow of commerce across state borders, for the Constitution contemplated, among other things, a national economic union. *See City of Philadelphia*, 437 U.S. at 623. States may regulate as

they see fit, but they are *not* free to erect discriminatory barriers to interstate commerce or to enact discriminatory restrictions on the flow of interstate goods and services into the state in order to preserve resources for the benefit of their own citizens. *See Chemical Waste Management, Inc.*, 504 U.S. at 339-41.

The Commerce Clause thus "limits the power of the States to discriminate against interstate commerce." *New Energy Co. of Ind.*, 486 U.S. at 273. Moreover, this Court has made clear that this constitutional principle extends to the transportation of wastes, including hazardous wastes, for treatment and disposal. *See C & A Carbone, Inc.*, 511 U.S. at 389 (town's solid waste flow control ordinance falls "within the domain of the Commerce Clause"); *Oregon Waste Sys., Inc.*, 511 U.S. at 100 (applying Commerce Clause to solid waste regulation); *Chemical Waste Management, Inc.*, 504 U.S. at 340 n.3 (concluding that Commerce Clause applies to the disposal of hazardous waste); *Fort Gratiot Sanitary Landfill, Inc.*, 504 U.S. at 359 & n.3 (stating that interstate movement of solid waste is governed by Commerce Clause); *City of Philadelphia*, 437 U.S. at 622-23 (noting that waste is article of interstate commerce governed by Commerce Clause).

In the opinion below, the Fourth Circuit noted that " 'a virtually *per se* rule of invalidity' applies where a state law discriminates facially, in its practical effect, or in its purpose." Pet. App. 18a (quoting and citing *Wyoming v. Oklahoma*, 502 U.S. at 454-55). When a law discriminates against interstate commerce—as is the case here—it can only be sustained if it " 'is demonstrably justified by a valid factor unrelated to economic protectionism' " and "there are no 'nondiscriminatory alternatives adequate to preserve the local interests at stake.' " Pet. App. 18a-19a (quoting and citing *New Energy Co. of Ind.*, 486 U.S. at 274 and *Chemical Waste Management, Inc.*, 504 U.S. at 342).

The Fourth Circuit applied these principles in analyzing Petitioners' evidence and argument in support of their

efforts to prevent out-of-state waste materials from entering South Carolina for disposal. The State's generalized health and safety concerns simply failed to justify the discrimination built into the regulatory scheme. As the court explained, "concern for citizens' health, safety, and welfare" provides no basis for *distinguishing* between in-state and out-of-state waste because "[h]azardous waste is equally dangerous whether generated within South Carolina or out-of-state." Pet. App. 20a (citing *Chemical Waste Management, Inc.*, 504 U.S. at 344-45).

Similarly, South Carolina's asserted purpose of preserving disposal capacity within the state could not justify discrimination. As explained in *City of Philadelphia* and discussed by the Fourth Circuit, a State's natural resources "may not be hoarded under the Commerce Clause." Pet. App. 21a; *see also Fort Gratiot Sanitary Landfill, Inc.*, 504 U.S. at 366; *Sporhase*, 458 U.S. at 956-58; *New England Power Co. v. New Hampshire*, 455 U.S. 331, 338 (1982); *City of Philadelphia*, 437 U.S. at 627; Pet. App. 70a-71a.

The court of appeals also rejected Petitioners' argument that the free flow of commerce imposed an unfair burden on South Carolina, noting that the Commerce Clause does *not* require "fairness" in the way that resources and businesses are allocated among States, but rather it prohibits discrimination. Pet. App. 21a. Finally, the court found nothing in the Capacity Assurance Plan ("CAP") requirement imposed by SARA that contemplated discrimination against out-of-state waste. The Commerce Clause does not "allow states to punish other states for not disposing of their wastes through a CAP or otherwise. That task is left exclusively to Congress." Pet. App. 21a-22a.

Petitioners do *not* dispute the Fourth Circuit's findings or reasoning on any of these issues. Rather, Petitioners argue: (1) that Congress has authorized South Carolina's facially discriminatory laws; (2) that two of the provisions—the disposal cap and the needs regulation, *see*

supra at 4-5—are neutral; and (3) that the doctrine of primary jurisdiction should apply.

With respect to each of these issues, this Court has supplied clear guidance, and the Fourth Circuit properly applied this Court's precedents.

A. Congress Did Not Authorize States To Enact Laws That Discriminate Against Interstate Commerce Involving Hazardous Waste

The most strongly urged of Petitioners' three arguments is that Congress has authorized South Carolina to enact discriminatory laws barring the flow of waste into the State by virtue of RCRA, CERCLA, and SARA, as well as EPA's "approval" of its regulatory role in these national environmental programs. As Petitioners acknowledge, however,

> for a state regulation to be removed from the reach of the dormant Commerce Clause, congressional intent [to free the States from those restrictions] must be *unmistakably clear*. The requirement that Congress affirmatively contemplate otherwise invalid state legislation is mandated by the policies underlying dormant Commerce Clause doctrine. It is not . . . merely a wooden formalism.

South-Central Timber Dev., Inc. v. Wunnicke, 467 U.S. 82, 91-92 (1984) (emphasis added); *see* Pet. App. 13a (citing *South-Central Timber*). The requirement that Congress' intention to permit State discrimination be "unmistakable" has been repeatedly reaffirmed by this Court. *See C & A Carbone, Inc.*, 511 U.S. at 408 (O'Connor, J., concurring); *Northeast Bancorp, Inc. v. Board of Governors*, 472 U.S. 159, 174 (1985); *White v. Massachusetts Council of Constr. Employers*, 460 U.S. 204, 213 (1983); *Sporhase*, 458 U.S. at 960; *New England Power Co.*, 455 U.S. at 340-43; *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 154-56 (1982).

The Fourth Circuit found at both the preliminary injunction stage, Pet. App. 73a-75a, and the summary

judgment stage that Petitioners had provided no persuasive evidence that "Congress intended to permit the states, directly or by EPA authorization, to engage in actions otherwise violative of the Commerce Clause." Pet. App. 14a (citation omitted).

Petitioners suggest that an "unmistakably clear" statement of congressional intent to allow state discrimination against interstate commerce can be found in RCRA's general requirement that a state RCRA program must be "consistent" with the state or federal programs operating in other states. 42 U.S.C. § 6926(b)(2) (1994); Pet. App. 106a. This statutory provision, requiring only "consistency," contains no language which would allow a State to impose a barrier against the transportation and disposal of out-of-state hazardous wastes within the State. As the Fourth Circuit held, nothing in RCRA, CERCLA, or SARA either grants the power to discriminate against out-of-state wastes or even contemplates that the States would have such power. *See also National Solid Wastes Management Ass'n v. Alabama Dep't of Envtl. Management*, 910 F.2d 713, 721-22 (11th Cir. 1990), *as modified upon denial of reh'g*, 924 F.2d 1001 (11th Cir.), *cert. denied*, 501 U.S. 1206 (1991) (SARA does not authorize discrimination against interstate commerce); *Alabama v. United States Envtl. Protection Agency*, 871 F.2d 1548, 1555 n.3 (11th Cir.), *cert. denied*, 493 U.S. 991 (1989) (CERCLA does not authorize discrimination against interstate commerce).

Indeed, Petitioners do not seriously press the argument that these statutes themselves authorize States to erect discriminatory barriers to interstate commerce. Rather, Petitioners argue that such authorization can be inferred from regulations EPA adopted "to flesh out the federal approval process." Pet. 16. Thus, Petitioners are asking this Court to overlook the nonexistent authorization in the statutory language and, instead, to rely upon EPA's administrative interpretation of the "consistency" stand-

ard. *Id.* Petitioners' "view of the Agency's role in the federal system" is that EPA should be allowed to authorize discrimination against interstate commerce. Pet. 20.[8]

This theory has many flaws, not the least of which is that this Court has consistently required that the authorization to discriminate against interstate commerce come from Congress, not an agency. Though Congress may

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[8] In this regard, Petitioners' reliance on *White v. Massachusetts Council of Construction Employers* is misplaced. In *White*, this Court considered the constitutionality of Boston's requirement that construction projects using certain federal funds be performed by a workforce at least half of whom were Boston residents. The Fourth Circuit found that *White* was inapposite because:

> The Supreme Court upheld the Mayor's order, finding that Boston acted as a market participant in spending the city's money. There is a well-settled exception to the dormant Commerce Clause for states or cities acting as market participants as opposed to government regulators of the market. Additionally, the Court noted that although federal funds were also implicated, Congress had specifically contemplated and directed that those funds be used in a similar manner to the city's money: to stimulate economic recovery; to create permanent jobs; to retain jobs that would be lost; to provide jobs to lower income persons and minorities, including the unemployed; and to retrain workers. Furthermore, the regulations implementing Congress's directives contained similar mandates, affirmatively permitting the type of parochial favoritism contained in the Mayor's executive order. *Thus, the preference for local employment had been expressly contemplated and authorized by Congress. In contrast, here, Congress merely contemplated that state RCRA programs be consistent with the federal and other states' approved programs.* Congress did not contemplate nor direct that state RCRA programs implement economic barriers to hazardous waste from other states. Nor do the EPA's regulations affirmatively and expressly authorize economic barriers to the interstate movement of hazardous wastes.

Pet. App. 15a-16a n.15 (citations omitted) (emphasis added). Although Petitioners attempt to muddy the water, EPA has never expressly approved *any* of the challenged laws, as outlined by the United States itself in the brief it submitted in connection with the first appeal to the Fourth Circuit in this case. U.S. Amicus Brief at 29-33.

delegate to an agency the authority to approve state discrimination, the decision in the first instance is for Congress to make.

Significantly, even Petitioners' repeated references to EPA approval of state RCRA programs under a "consistency" standard are misleading in this context. At best, EPA has a general oversight responsibility that allows it to approve state RCRA programs for the regulation of hazardous waste generators, transporters and disposal facilities as a substitute for the federal regulatory structure *in that state*. Thus, EPA sets minimum standards for *administrative approval* of a state RCRA program. These minimum standards do not supplant any constitutional requirements. EPA's "review" of a state RCRA program is not focused on the constitutional issues presented here. *See* U.S. Amicus Brief at 30-31.

More importantly, notwithstanding the contrary implication in the Petition, "the EPA has *not* expressly approved *any* of the contested South Carolina laws." Pet. App. 17a (emphasis added). Petitioners do not challenge this conclusion. Indeed, EPA itself made clear to the court of appeals that it has *not* approved or passed upon the "challenged South Carolina statutes, executive orders, and regulation." U.S. Amicus Brief at 32. Thus, in no respect has EPA lent its imprimatur to the South Carolina laws in question. South Carolina's argument about what the effect of EPA approval might be, *if* EPA approval of these laws had been granted, is not an issue presented by this Petition.[9]

EPA's RCRA "consistency" regulation does not suggest that EPA believed it was authorized to supplant

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[9] As the United States discussed in the court below, it "is not necessary for this Court to address [the extent to which Congress has delegated power to the executive branch under RCRA or CERCLA to authorize state law that would otherwise offend the Commerce Clause] because EPA never approved South Carolina's challenged authorities." U.S. Amicus Brief at 30 n.16.

constitutional requirements, or that it was engaged in the delicate task of creating a constitutional standard, whether in initially promulgating or in revising its consistency regulation. *See* Pet. App. 74a. Petitioners simply ignore the fact that EPA itself has taken the position—and took the position in this case—that *Congress* has *not* authorized states to discriminate against out-of-state wastes. U.S. Amicus Brief at 22-23, 27-28.

In fact, Petitioners' argument is *not* that the agency has adopted a position that expressly authorizes a State to discriminate against interstate commerce. Petitioners cannot so argue because the consistency regulation itself prohibits such discrimination. 40 C.F.R. § 271.4(a) (1995); Pet. App. 109a. Rather, Petitioners' argument is that EPA's regulation adopts a *standard* for judging permissible discrimination for purposes of EPA's consistency review and that the EPA standard is slightly different from the standards that a court would apply if asked to determine whether a state law improperly discriminates against interstate commerce under the Commerce Clause.

Whether a particular law might be approved as "consistent" by EPA, though it would fail to meet the constitutional standards that a court would apply if asked to make a constitutional determination, is by no means clear. Moreover, even assuming a difference in standards, a determination by EPA that a state law meets the minimal standards for consistency does *not* suggest that EPA's RCRA standard supplants the constitutional principle of non-discrimination, where a court has been presented with a proper Commerce Clause claim. Subtle questions about the relationship between EPA approval of a state law as administratively "consistent," on the one hand, and constitutional requirements, on the other, or about the precise nature of any differences between these two standards as applied, might be fairly presented for review in a case in which EPA *has* approved the law in question. Those issues, however, are not presented by this case.

Moreover, drawing on established principles, the Fourth Circuit held that the authorization to permit a State to discriminate against interstate commerce must be part of the congressional plan, not merely an administrative agency's decision. Thus:

> States may not engage in economic protectionism and RCRA appears to contain no clear statement or indication of legislative intent to permit states to override the Constitution. EPA may change its interpretation of its own regulation; however, we cannot change the commands of the Constitution and Congress.

Pet. App. 77a (citations omitted). This Court's cases consistently describe the power to displace the limitations imposed by the Commerce Clause as a power that belongs to Congress. To be sure, in enacting a given statute, Congress may contemplate that a federal agency could, by approving a specific state action, place that approved state action beyond the reach of the Commerce Clause. Thus, the congressional power can be delegated. An agency cannot, however, assume that power on its own initiative. Therefore, even if EPA had approved the specific laws and regulations at issue as consistent with RCRA (which it did not), and even if EPA expected its approval to supplant constitutional requirements (which it did not), the question would still remain whether *Congress* contemplated that states might be authorized to enact facially discriminatory laws under these federal statutes. The Fourth Circuit concluded that it did not.

Merrion v. Jicarilla Apache Tribe, 455 U.S. 130 (1982), does not stand for the proposition, asserted by Petitioners, that an administrative agency's endorsement can substitute for a congressional delegation of authority. *See* Pet. 20. At most, *Merrion* suggests that the statutory scheme itself may demonstrate that an administrative agency has been granted authority to approve actions which might otherwise violate the Commerce Clause. In *Merrion,* this Court held that the tax in question did

not violate the Commerce Clause because it evenhandedly burdened minerals sold, whether on or off the reservation. *See Merrion*, 455 U.S. at 156-58.

With respect to congressional authorization to enact discriminatory laws, Congress had provided in *Merrion* "a series of federal checkpoints" that governed the exercise of the power to tax by Native American tribes. *Id.* at 155. Congress specifically required approval by the Secretary of the Interior before a tribe could impose a tax upon nonmembers. *Id.* The Court found that the Secretary had twice approved the provisions at issue, once by approving the tribe's revised Constitution announcing its intention to tax non-members and once by approving the ordinance imposing the tax. *Id.* Congress had clearly contemplated that the tribes would implement the specific type of discriminatory tax at issue and had established a mechanism to ensure that any such tax was approved by the Secretary. *See id.* at 155-56.

Here, as the court of appeals determined, no evidence suggests that Congress contemplated facial discrimination such as that enacted by South Carolina. Moreover, the fact that EPA has never expressly approved *any* of the challenged enactments undermines the notion that specific checkpoints (such as those at issue in *Merrion*) have been put in place by Congress to permit federal agency approval and authorization of state laws discriminating against interstate commerce. *See* Pet. App. 16a-17a.

Significantly, the Eleventh Circuit has addressed the issue presented here. It reached precisely the same conclusion as did the Fourth Circuit. In *National Solid Wastes Management Ass'n*, the Eleventh Circuit held that SARA's capacity assurance requirement, a provision upon which Petitioners here too rely, was not congressional authorization of discriminatory actions by States which impede interstate commerce. *See National Solid Wastes*

Management Ass'n, 910 F.2d at 721-22. In an earlier opinion, the Eleventh Circuit similarly concluded that CERCLA did not have that effect. *See Alabama*, 871 F.2d at 1555 n.3.

Therefore, the issue presented was well-decided under clearly established principles. The question does not warrant this Court's attention.

B. South Carolina's Two Supposedly "Neutral" Laws Are Not Severable From South Carolina's Facially Discriminatory Laws And Are Not Neutral And Evenhanded

Petitioners' second argument is that two of South Carolina's challenged laws are neutral and evenhanded, requiring the courts to apply the *Pike* balancing test, rather than the "virtually *per se*" test of invalidity.

Neither provision is neutral, in fact. While granting that an evenhanded cap on the number of tons of waste which can be landfilled in the state in any given year would likely pass constitutional muster, the court of appeals noted that the disposal cap at issue here was *not* evenhanded. The cap was easily circumvented for the benefit of in-state interests but not for out-of-state interests. *See* Pet. App. 23a-24a, 129a-33a, 138a-41a. For instance, the ceiling could be lifted upon certification that it "is necessary to protect the health and safety" of South Carolina's citizens or that the entire statutory authorization of buried waste during the relevant twelve-month period was generated in South Carolina. Pet. App. 23a, 132a. No comparable exceptions applied to out-of-state waste. Thus, the cap discriminated against interstate commerce. *See* Pet. App. 23a-24a (citing *West Lynn Creamery, Inc. v. Healy*, 512 U.S. 186 (1994)).

Petitioners devote only a few words in passing to the court of appeals' conclusion that the cap could not be severed from the portions of the law that rendered it discriminatory. This issue is one of state law. The court of

appeals held that it could not be severed because the court could not

> fairly presume that the South Carolina legislature would have passed the overall limit without the provision allowing the limit's increase if South Carolina wastes exceeded the cap. Nor can we assume that the limit would have been passed without the remaining provisions of the statute, which include floors for in-state-wastes and ceilings for out-of-state wastes. By protecting capacity for in-state interests, the legislature may have [s]quelched in-state political interests that might otherwise have lobbied against the overall limit.

Pet. App. 24a n.21.

Petitioners also suggest that the "needs" regulation, governing approval for new or expanded hazardous waste facilities based on "need," is also neutral. However, the "needs" regulation was itself structured to allow expansion to serve in-state waste generators, while prohibiting facilities from expanding to meet out-of-state needs. Pet. App. 25a, 136a. It thus plainly discriminated against interstate wastes.[10]

C. The Lower Court's Application Of The Primary Jurisdiction Doctrine Presents No Novel Or Important Legal Issue

Finally, Petitioners argue that the court of appeals erred because it failed to remit the constitutional issue to

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[10] Petitioners obfuscate the issue by complaining that the Fourth Circuit had no evidence before it demonstrating that expanded capacity would be used in a discriminatory manner or that expansions would be allowed whenever in-state need required. These two observations are irrelevant to the issue presented in the Petition. If the needs requirement is facially discriminatory, whether it might *also* be discriminatory in application does not save it from constitutional challenge.

EPA for determination under the doctrine of primary jurisdiction.[11]

As this Court has held, primary jurisdiction is a discretionary doctrine, designed to allow the courts to seek guidance from federal agencies for the resolution of factual (rather than legal) issues within the agency's special expertise. *See Nader v. Allegheny Airlines, Inc.*, 426 U.S. 290, 304 (1976); *Far East Conference v. United States*, 342 U.S. 570, 574 (1952); Pet. App. 26a. Legal issues within the competence of federal courts, however, should *not* be referred to an agency, especially where "the expert and specialized knowledge" of the agency is not required. *See Nader*, 426 U.S. at 305 (quoting *United States v. Western Pacific R.R. Co.*, 352 U.S. 59, 64 (1956); *cf.* Pet. App. 26a (citing *Massachusetts v. Blackstone Valley Elec. Co.*, 67 F.3d 981, 992 (1st Cir. 1995); *Mashpee Tribe v. New Seabury Corp.*, 592 F.2d 575, 580 (1st Cir.), *cert. denied*, 444 U.S. 866 (1979), and *cert. denied*, 464 U.S. 866 (1983)).

Petitioners argue that the case should have been referred to EPA so that EPA could construe the "federal statute and regulation." Pet. 28. Petitioners misconstrue the primary jurisdiction doctrine. The doctrine does not provide a vehicle through which a federal agency provides a consultation to the courts on the constitutional implications of a federal statute. The district court concluded, and the Fourth Circuit affirmed, that Environmental Technology's constitutional challenges presented only legal issues. Article III courts do not require agency assistance in deciding the constitutional issues presented by this case. *See Nader*, 426 U.S. at 305-06; Pet. App. 27a.[12]

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[11] South Carolina sought referral to EPA only after the district court and court of appeals had refused its request to stay the case and refer the issues to *state* proceedings under various abstention doctrines. Pet. App. 64a-65a n.10.

[12] Petitioners argue in a footnote that questions of fact were present such that referral to EPA was appropriate. However, South Carolina's laws were *facially* unconstitutional; in such cases,

Indeed, Petitioners have not shown that any such consultation was needed here; the courts had little difficulty understanding either the language or the workings of the federal statutory scheme. The statutes that Petitioners invoked simply do *not* support the proposition advanced by Petitioners: that Congress intended to authorize state discrimination against out-of-state waste.[13] The agency's advice was not needed to determine whether these provisions did, in fact, discriminate against interstate commerce.

In fact, Petitioners' argument that agency input as to the meaning of the statute or resolution of the constitutional question should have been obtained *via* the primary jurisdiction doctrine bears an air of unreality in the circumstances of this case: The United States appeared in the initial appeal on behalf of EPA, submitting a brief *amicus curiae,* demonstrating (1) that Congress has *not* authorized South Carolina to discriminate against out-of-state wastes under RCRA, CERCLA or SARA, and (2) that EPA itself has not done so either. U.S. Amicus Brief at 19-33. Where opinions of law are sought from an agency, one accepted method for doing so is to allow the agency to express its views as an *amicus curiae.* The EPA's views were presented here. The doctrine of "primary jurisdiction" may work well for the resolution of complex factual matters but was certainly not required here.

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only the language of the law itself, which Petitioners do not dispute, is at issue. Pet. 29 n.21.

[13] Petitioners confuse a number of different issues in arguing that the Fourth Circuit should have applied a *de novo* standard of review to the district court's decision not to refer the matter to EPA because the district court's decision was based on erroneous conclusions of law. The Fourth Circuit held that the question whether an issue should be referred under the primary jurisdiction doctrine is a discretionary matter. The Fourth Circuit then went on to hold that "because the matter at issue is a constitutional question which lies within this court's expertise, the district court correctly applied the law." Pet. App. 27a n.24.

The federal courts are competent to decide constitutional issues of the type presented without soliciting the advice of federal agencies. They are free to obtain the opinion of the United States on a legal issue as *amicus curiae* in such a case. Here, the United States provided that advice, and it did not aid Petitioners. Petitioners have not provided any support for the proposition that the lower courts' failure to refer constitutional issues to EPA violated established law or has created a disagreement among the circuit courts.

CONCLUSION

The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

STATE OF SOUTH CAROLINA; DAVID M. BEASLEY, Governor of the State of South Carolina; DOUGLAS E. BRYANT, Commissioner of the South Carolina Department of Health and Environmental Control; SOUTH CAROLINA DEPARTMENT OF HEALTH AND ENVIRONMENTAL CONTROL; SOUTH CAROLINA BOARD OF HEALTH AND ENVIRONMENTAL CONTROL,
Petitioners,

v.

ENVIRONMENTAL TECHNOLOGY COUNCIL,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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PETITIONERS' REPLY BRIEF

The Environmental Protection Agency ("EPA") expressly approves certain state laws affecting interstate movement of hazardous waste that the dormant Commerce Clause would otherwise prohibit. Its regulation to that effect implements the so-called "consistency" provisions of Section 3006 of the Resource Conservation and Recovery Act of 1976, as amended ("RCRA"), 42 U.S.C. § 6926 (1995). Specifically, the Agency's rule provides authorization for state laws that do not "*unreasonably* restrict[], impede[], or operate[] as a ban on the free movement" of waste across state borders. 40 C.F.R. § 271.4(a) (emphasis added). By contrast—as respondent Environmental Technology Council ("ETC") thoroughly recites (Resp. Opp. 6-9, 16-17)—the dormant Commerce Clause generally creates a "virtually *per se* rule of invalidity" as to differential treatment of commerce based on state origin. *Wyoming v. Oklahoma*, 502 U.S. 437, 454-55 (1992) (quoting *City of Philadelphia v. New Jersey*, 437 U.S. 617, 624 (1978)). Respondent itself concedes that the requirements of 40 C.F.R. § 271.4 are "different from the standards that a court would apply if asked to determine whether a state law improperly discriminates against interstate commerce." Resp. Opp. 13.

Because the RCRA criteria administered by EPA allow what the Commerce Clause would prohibit, under this Court's precedents the dormant Commerce Clause is displaced and the RCRA standard governs in its stead. *See Northwest Airlines, Inc. v. County of Kent*, 510 U.S. 355, 373 (1994) (differences between administrative standard and dormant Commerce Clause standard that are "[s]ufficiently clear" may "rule out judicial dormant Commerce Clause analysis"); *White v. Massachusetts Council of Constr. Employers, Inc.*, 460 U.S. 204, 215 (1983) (discrimination in city's spending of federal funds permitted where "affirmatively sanctioned by the pertinent regulations of those programs"); *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 156 (1982) (dormant Commerce Clause review unnecessary where it would "dupli-

cate the administrative review called for by the congressional scheme"); *cf. Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

In suggesting that the Fourth Circuit's refusal in this case to give effect to these precedents does not merit this Court's review, respondent ETC essentially puts forward three points. The first is that the RCRA-derived standard might not actually be different from those supplied by the dormant Commerce Clause. Another is that EPA has not actually approved the South Carolina laws at issue. And the third—made although respondent ETC has not challenged the validity of EPA's rule—is to imply that Section 271.4 may not be a permissible implementation of RCRA. Each of these points finds at least an echo in the Fourth Circuit's opinion. Each is unsupportable. This case squarely presents each of the questions posed by the petition, including the question of statutory displacement of the dormant Commerce Clause.

1. ***The RCA standard for assessing effects on interstate commerce is distinct from those of the dormant Commerce Clause.***

The plain terms of Section 271.4(a) create a standard of "reasonableness" distinct from the dormant Commerce Clause standards. And there can be no doubt that EPA has acted on the understanding that the RCRA standard is different in its application. By way of example, in acting on South Carolina's proffered hazardous waste program in 1985, EPA expressly approved the State's imposition of different fees for disposal of in-state and out-of-state waste. *See* 50 Fed. Reg. 46,437 (Nov. 8, 1985), Pet. App. 110a-122a, discussed in the Petition at 6 n.1, 25-26. In contrast, this Court has held that such differential fees violate the dormant Commerce Clause. *Chemical Waste Mgmt. v. Hunt,* 504 U.S. 334 (1992).

Moreover, in the 1985 proceedings before EPA, respondent (then using its former name, "Hazardous Waste Treatment Council") had explicitly challenged South

Carolina's differential fee on the ground that "the disparity [in the fees] in favor of in-State wastes was unconstitutional and therefore was inconsistent under RCRA 3006(b) and an unreasonable restriction or impediment under § 271.4(a)." Pet. App. 116a. EPA's response was unequivocal:

> EPA does not agree that *any* disparity in treatment between in-State and out-of-State wastes is *per se* unreasonable. Contrary to the statement by the Hazardous Waste Treatment Council, the preamble adopting this regulation did not state that EPA was relying on the Constitutional test for impermissible restraints on interstate commerce as the basis for finding restrictions or impediments unreasonable. The Agency is not required to adopt the Constitutional test for impediments or restrictions in interpreting its own regulations, and declines to do so here.

Pet. App. 117a.

Regarding the interpretation and application of the RCRA standard, the Fourth Circuit did note that, in its view, "EPA's position on what constitutes 'reasonableness' has changed over time." Pet. App. 14a. That may well be true, but it does not show that EPA would equate the RCRA standard with a dormant Commerce Clause criterion. The explicit circumstances respecting South Carolina's program are proof to the contrary. Thus, ETC's professed ignorance as to "[w]hether a particular law might be approved as 'consistent' by EPA, though it would fail to meet the [dormant Commerce Clause] standards," Resp. Opp. at 13, is unconvincing and not grounds for denying certiorari. The conflict is real, and ripe for consideration by this Court.[1]

---

[1] *Compare Northwest Airlines, supra*, 510 U.S. at 367 (where the Court did not "have the benefit of the Secretary's reasoned decision concerning the [statute's] permission for the charges in question"). Here, EPA has promulgated and applied a standard at odds with those of the dormant Commerce Clause.

2. The Fourth Circuit has applied the dormant Commerce Clause to strike down a federally approved state program.

Drawing upon a brief filed in 1991 (at the preliminary injunction stage of this case) by the United States as *amicus curiae*,[2] respondent ETC asserts repeatedly that "EPA has not expressly approved any of the contested South Carolina laws." Resp. Opp. at 12; *see also id.* at 11 n.8 and 13-15. This assertion echoes that of the Fourth Circuit, Pet. App. 17a, but it is outdated and wrong. First, while the challenged South Carolina laws were adopted after the State's initial RCRA approval was granted in 1985, *see* Petition at 6, the State's RCRA approval was extended in 1994 and 1995, while this case was pending before the district court and the court of appeals. EPA's extension of approval in November 1994 involved state regulations which are not at issue here. *See* 59 *Fed. Reg.* 60,910 (Nov. 29, 1994). However, as was pointed out to the Fourth Circuit, in 1994 South Carolina submitted a set of program revisions which included, for example, S.C. Code Ann. § 44-56-60. That statute is at issue in this case; subsection (a) codifies the State's hazardous waste landfilling restrictions enacted in Act No. 590. *See* Petition at 8; Pet. App. at 131a-132a. On August 15, 1995, EPA acted on that submission and concluded that the State's "hazardous waste program revisions satisfy all of the requirements necessary to qualify for final authorization," and it "approve[d] South Carolina's hazardous waste program revisions." 60 *Fed. Reg.* 42,046 (Aug. 15, 1995). In approving the various

[2] This brief of the United States as *amicus curiae* was filed in the Fourth Circuit and in this case, albeit nearly six years ago. Thus, it may be technically correct for respondent ETC to make references to that brief by saying "[a]s the United States discussed in the court below, . . ." Resp. Opp. 12 n.9, and "EPA itself . . . took the position in this case. . . ." *Id.* at 13. Nonetheless, if and to the extent that such references suggest that the United States' *amicus* brief was filed during the Fourth Circuit's consideration of the decision now before the Court, that would be wrong.

program revisions, EPA relied upon S.C. Code Ann. § 44-56-60 ten times, and three times specifically cited § 44-56-60(a), the provision containing the challenged cap on overall disposal by burial in the State. 60 *Fed. Reg.* at 42,047, 42,048, 42,049, 42,050, 42,053, 42,054, 42,060, 42,066 (checklists 14, 17E, 17S, 23, 24, 36, 44A, 44B, 77, and 87).[3] The six-year-old *amicus* brief of the United States that ETC has lodged with the Court could not reflect these developments and should be given no weight.[4] More properly, as the Fourth Circuit

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[3] The Fourth Circuit acknowledged the 1995 RCRA approval, Pet. App. 10a & n.11. It commented that the approval by EPA of a particular checklist item (17E) relating to "location standards for salt domes, salt beds, underground mines and caves" could not be viewed as a finding by EPA regarding "the overall limit on hazardous waste burial and the ceilings and floors in question." *Id.* at n.11.

However, the Fourth Circuit did not address the fundamental point of EPA's 1995 action. The amended Section 44-56-60(a) before EPA in 1995 contains the cap on disposal struck down by the district court, and that cap applies to land disposal generally, which would include disposal in salt domes as well as landfills. EPA approved the provision without expressing any view regarding interstate effects. Certainly at that time, ETC did not raise in the EPA approval proceeding any critical commentary along the lines of its present challenge. Indeed, ETC would have been imprudent from its tactical perspective to have raised the interstate-commerce consistency issue anew before EPA. It had recently prevailed in the district court on its Commerce Clause theory, and in the district court it had successfully resisted the State's motion for referral to EPA of the very same consistency question.

[4] The Fourth Circuit in its October 1996 decision made no reference whatsoever to the *amicus* brief which that same court had received from the United States in the 1991 appeal by the State from the grant by the district court of a preliminary injunction. In 1991, the United States as *amicus curiae* could, and did, state "that EPA did not approve the challenged South Carolina statutes, executive orders, and regulation in its approval of South Carolina's hazardous waste management program under section 3006 of RCRA." Brief for the United States as *Amicus Curiae* in *Hazardous Waste Treatment Council v. South Carolina*, 945 F.2d 781 (4th Cir. 1991). In 1996, the United States could not, and did not, reiterate any such statement.

acknowledged, "EPA continues to approve South Carolina's hazardous waste program under RCRA." Pet. App. 10a.[5]

Also, the State provisions challenged here were put before EPA in connection with its consideration of the State's Capacity Assurance Plan in 1990. *See* Petition at 5 (discussing capacity assurance requirements of Section 104(c)(9) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended ("CERCLA"), 42 U.S.C. § 9604(c)(9)). In submitting its Capacity Assurance Plan, the State included or projected for inclusion all the provisions challenged by ETC. In 1989, acting pursuant to its policy of using the CERCLA capacity assurance process to address "State actions which may be inconsistent with the federal [RCRA] program," EPA formally requested that the State demonstrate its compliance with Section 271.4(a) in light of the challenged provisions. EPA Policy Memorandum of Dec. 23, 1988 (Pet. App. 123a); Letter from Greer C. Tidwell to Michael D. Jarrett (July 6, 1989) (citing Section 271.4(a) and stating that "[i]n order for South Carolina to maintain final authorization it must continue to meet the consistency requirements of RCRA" (Reply Supp. App. SA-1).[6] South Carolina responded to EPA's

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[5] In fact, the State makes a biannual report to EPA of the status of its hazardous waste regulatory program and notes any changes that have been made in that program over the preceding six months. The State makes that report precisely because the program is approved by EPA and it has "final authorization" within the meaning of 40 C.F.R. § 271.3. EPA can and does pose questions about the program that might arise. In all events, EPA has had notice of the changes to South Carolina's program.

Under EPA's regulations, it may initiate proceedings *sua sponte*, or on petition from an interested person, to withdraw approval of the State program for "alleg[ed] failure to comply with the requirements of this part [EPA's rules] as set forth in § 271.22." 40 C.F.R. § 271.23(b)(1).

[6] This letter was part of the record of the case in the district court and in the court of appeals. It has been reprinted as an appendix to this reply brief, and thus has been cited as "Reply Supp. App."

request with an appropriate legal opinion, and on May 10, 1990, EPA "formally approve[d] South Carolina's Capacity Assurance Plan." Letter from Greer C. Tidwell to the Hon. Carroll A. Campbell, Jr., Governor of South Carolina (May 10, 1990) (Reply Supp. App. SA-4). And, again, since receiving the State's response EPA has maintained and extended the State's RCRA approval.

Thus, South Carolina has, both before and after adopting the laws at issue here, continued to operate a federally approved RCRA program. Under the terms of RCRA, such state programs operate "in lieu of the Federal program" and "have the same force and effect as action taken" by EPA. RCRA § 3006(b) and (d), 42 U.S.C. § 6926(b) and (d). That federally approved status must be given effect to bar "dormant" Commerce Clause analysis. *Cf. Gade v. National Solid Wastes Management Assoc.*, 505 U.S. 88, 99 (1992) (under Occupational Safety and Health Act, 29 U.S.C. § 667(b), an "approved state plan . . . displaces the federal standards.").

3. Because Section 271.4(a) supplies the applicable standard, the Fourth Circuit erred in applying dormant Commerce Clause analysis.

Although South Carolina's RCRA program continues to be federally approved, ETC's challenge to the State's program has never been considered—either by EPA or the courts—under the "reasonableness" standard created by RCRA and Section 271.4(a). That is a result of the Fourth Circuit's error, not, as ETC asserts (Resp. Opp. 12-15), a reason to let the Fourth Circuit's decision stand. The Fourth Circuit denied the State an opportunity for a hearing under the "reasonableness" standard, on the basis that Section 271.4 was binding only on EPA, not the judiciary. Thus, even if the State's laws passed muster under Section 271.4 and were approved, the Fourth Circuit opined that "we could not do so without express congressional authorization." Pet. App. 17a.

The Fourth Circuit's decision fails to give the RCRA standard its proper effect under this Court's precedents.

Section 271.4(a) by its terms regulates not simply EPA's *approvals* of state programs, but the *substance* of the programs themselves. That is, the regulation expressly governs a program's "consistency" under RCRA and thus its permissibility under federal law. If EPA's rule is valid, then under *Northwest Airlines, Merrion,* and *White, supra,* no part of the State's program can be struck down under the dormant Commerce Clause; the challenged provisions must be evaluated under the governing Section 271.4 standard.

There is no challenge to Section 271.4 in this case. But, if the Fourth Circuit had questions in that regard, it was incumbent on the court to resolve the matter explicitly, *before* addressing the dormant Commerce Clause. Instead, the Fourth Circuit undertook no analysis of EPA's RCRA-implementing regulations—whether under the doctrine of *Chevron, supra,* or any other basis. The court only determined whether, without regard to EPA's regulations, the statutory terms expressly authorized the State's laws in an "unmistakably clear" fashion. Pet. App. 12a-14a (citing *South-Central Timber Dev., Inc. v. Wunnicke,* 467 U.S. 82, 91-92 (1984)). Nothing in *South-Central Timber* or any other of the Court's precedents requires or permits a court to disregard an agency's implementation of a statute it administers merely because the case implicates the dormant Commerce Clause. To the contrary, *White* and *Merrion* confirm that agency regulations and actions may displace the dormant Commerce Clause, and thus must be considered in the first instance. The Fourth Circuit was not free to find no fault in Section 271.4, and yet refuse to apply it.[7]

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[7] ETC asserts that "this Court has consistently required that the authorization to discriminate against interstate commerce come from Congress, not an agency," Resp. Opp. 11, but this postulate is presented without any citation of authority. Agency regulations must be authorized by direct or delegated exercise of Commerce Clause power; where authorized, there is no basis for assigning them a lesser effect under the dormant Commerce Clause. *Cf. A.L.A. Schechter Poultry Corp. v. United States,* 295 U.S. 495 (1935).

Finally, ETC's assertion that a dormant Commerce Clause issue is "not presented by this case," because there has been no proceeding before EPA to address the challenged laws under Section 271.4(a) (Resp. Opp. 13), is an ironic one. The State has sought an administrative proceeding for years, by means of a reference to EPA's primary jurisdiction. ETC has opposed such a reference and the lower courts have denied it. *See* Petition at 10-11, 28-30. ETC also chose to bring its challenge in federal court despite the availability of an administrative remedy which would have tested "consistency" under Section 271.4(a). *See* 40 C.F.R. §§ 271.22, 271.23; Petition at 29 n.20. Moreover, in bypassing the administrative forum and opposing a referral to EPA, ETC has urged the lower courts to apply dormant Commerce Clause doctrine without reaching the question as to the status of the challenged laws under the Section 271.4 "reasonableness" standard. The Fourth Circuit agreed, and has affirmed a summary judgment against the State on the grounds that the dormant Commerce Clause bars any consideration of Section 271.4. The Fourth Circuit and ETC have this analysis exactly backwards: one must first resolve the regulatory question to determine whether the dormant Commerce Clause applies at all. The error presented by the Fourth Circuit's decision is a question properly before the Court.

That question is of substantial importance for federal-state environmental regulation under RCRA and many similar statutes, and deserves review by this Court. Otherwise, claimants such as ETC will always bypass the prescribed administrative process in favor of a dormant Commerce Clause challenge, as the Fourth Circuit permitted here. And, if the courts reject requests to refer questions to the agency, as also happened here, the administrative machinery established by Congress to implement federal law will assuredly be bypassed.[8]

* * * *

[8] Referral to the agency under the primary jurisdiction doctrine is the best procedural route for obtaining the agency's views be-

Each time EPA has considered South Carolina's RCRA program—both before and after the State adopted the laws at issue here—the State has received federal approval. Conversely, the challenged provisions have never been held—either by EPA or by the courts—to be "unreasonable" under the RCRA consistency standard, a standard which under established precedent should displace dormant Commerce Clause analysis. Nonetheless, summary judgment has been entered against the State, with the unprecedented result that a federally approved state program has been struck down under the *dormant* Commerce Clause. A grant of certiorari is warranted.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

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cause it ensures that a considered decision of the agency itself will be obtained. In *Massachusetts v. Blackstone Valley Electric Co.*, 67 F.3d 981 (1st Cir. 1995), the First Circuit was faced with the question whether ferric ferrocyanide was one of the "cyanides" within the meaning of EPA regulations codified at 40 C.F.R. § 401.15 and 40 C.F.R. § 302.4, Table 302.4. A brief on the question was submitted by the United States as *amicus curiae*, but the court of appeals rejected the position urged in the *amicus* filing even while agreeing that the question was one that "must be left to the EPA." *Blackstone Valley Elec.*, 67 F.3d 988. The court explained why it was ordering referral rather than accepting a regulatory-framework argument proffered in the *amicus* filing:

> we are not persuaded [by the regulatory framework argument], for a number of reasons. The regulatory text itself does not support the argument; the argument leads to results which are overbroad and defy common sense; the EPA itself has taken inconsistent positions; the position is articulated solely and for the first time in a litigation posture; and policy reasons dictate against the approach proposed by the EPA.

Id.

Respectfully submitted,

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February 14, 1997

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SUPPLEMENTAL APPENDIX

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4WD-RCRA

Mr. Michael D. Jarrett, Director
South Carolina Department of Health
and Environmental Control
2600 Bull Street
Columbia, South Carolina 29201

Dear Mr. Jarrett:

This letter is in regard to enactment of Executive Order 89-17 which prohibits commercial hazardous waste treatment or disposal facilities in South Carolina from accepting hazardous wastes generated in another state which prohibits the treatment, storage, or disposal of hazardous wastes within its own borders, or which fails to comply with 42 U.S.C. § 9604(C)(9) of the Comprehensive Environmental Response, Compensation, and Liability Act, as amended.

Section 3006(b) of RCRA requires that authorized State programs must be "consistent" with the Federal program and other state programs. It is EPA's position that the impact of the South Carolina Executive Order may render the South Carolina hazardous waste management program inconsistent. Pursuant to 40 C.F.R. 271.4(a):

> Any aspect of the State program which unreasonably restricts, impedes, or operates as a ban on the free movement across the State border of hazardous wastes from or to other States for treatment, storage, or disposal at facilities authorized to operate under the Federal or an approved State program shall be deemed inconsistent.

In order for South Carolina to maintain final authorization it must continue to meet the consistency requirements of RCRA. Enactment of the Executive Order subjects South Carolina to the withdrawal criteria found at 40 C.F.R. 271.22.

Therefore, the Agency is requesting, as provided at 40 C.F.R. 271.21(d), that the State provide:

1. A certified copy of the Executive Order and House Bill 332.
2. A supplemental Authority General's statement, including the State's certification that the Act is equivalent, consistent and not less stringent than the federal and other authorized state programs;
3. A supplemental program description addressing the intent and effect of the Act's provisions on the operation of commercial hazardous waste facilities in the State of South Carolina; and
4. Responses to the following information requests addressing the intent and effect of the Act's provisions on the operation of commercial hazardous waste facilities in the State of South Carolina.

Information Requests

A. Please state the basis in human health or environmental protection of the Act.

B. How will the Act impact South Carolina's ability to enter into inter-state agreements or compacts?

C. What criteria will be used in determining which states will be listed by the Department?

Also, please provide a copy of the transcripts on the Legislative proceedings of South Carolina House Bill 322 in the South Carolina General Assembly.

The above-requested documents and information should be submitted to EPA—Region IV within thirty (30) days of your receipt of this letter.

If you have any questions or need further clarification, please do not hesitate to contact me.

Sincerely yours,

Original signed by

Greer C. Tidwell
Regional Administrator

bcc: Suzanne Rudzinski, HQ SPB
Alvin Lenior, ORC
Carl Terry
Loretta Hanks, OCEA
Judi Kane

HERBERT:cdw:6/13/89 DOC: JARRETT-M.D.S.C.

HERBERT

/s/

JOHNSON

/s/

SCARBROUGH

/s/

TOBIN

/s/

TIDWELL

[Logo]

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION IV

345 Courtland Street, N.E.
Atlanta, Georgia 30365

Honorable Carroll A. Campbell, Jr.
Governor of South Carolina
State Capitol
Columbia, South Carolina 29211

Dear Governor Campbell:

We have completed our review of South Carolina's Capacity Assurance Plan (CAP) submitted on October 17, 1989 in fulfillment of Superfund Amendments and Reauthorization Act (SARA). SARA Section 104(k) requires each state to assure adequate hazardous waste management capacity for all hazardous waste generated in the state for the next 20 years as a condition for remedial action Superfund monies after October 17, 1989.

I am writing to formally approve South Carolina's Capacity Assurance Plan with the condition that additional information on mixed waste and wastewaters be submitted in October 1991. Your 1989 plan does not include information on the quantity and type of mixed waste and on-site facilities. Because we consider these additional conditions minor, they do not affect Superfund monies available to the state. We will make arrangements with the South Carolina Department of Health and Environmental Control to obtain the additional information as part of your approval.

I would like to take this opportunity to thank you and your staff for the excellent work that went into preparing this document and the interstate agreement negotiated by the five Region IV states. South Carolina's leadership was instrumental in developing the agreement and I am hope-

ful that the process will continue to evolve and eventually include all of the sister states in the southeast.

The efforts and cooperation of you and your staff reflect South Carolina's deep commitment to solving the hazardous waste management issue which is one of our most pressing environmental concerns. Many thanks to all who participated in this difficult but crucial process.

Sincerely yours,

/s/ Greer C. Tidwell
GREER C. TIDWELL
Regional Administrator

cc: R. Lewis Shaw

May 10, 1990

(5)

Supreme Court, U.S.
FILED
JUN 9 1997
OFFICE OF THE CLERK

No. 96-1102

IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

STATE OF SOUTH CAROLINA; DAVID M. BEASLEY, Governor of the State of South Carolina; DOUGLAS E. BRYANT, Commissioner of the South Carolina Department of Health and Environmental Control; SOUTH CAROLINA DEPARTMENT OF HEALTH AND ENVIRONMENTAL CONTROL; SOUTH CAROLINA BOARD OF HEALTH AND ENVIRONMENTAL CONTROL,
Petitioners,

v.

EVIRONMENTAL TECHNOLOGY COUNCIL,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

---

PETITIONERS' SUPPLEMENTAL BRIEF

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June 6, 1997

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IN THE

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OCTOBER TERM, 1996

No. 96-1102

STATE OF SOUTH CAROLINA; DAVID M. BEASLEY, Governor of the State of South Carolina; DOUGLAS E. BRYANT, Commissioner of the South Carolina Department of Health and Environmental Control; SOUTH CAROLINA DEPARTMENT OF HEALTH AND ENVIRONMENTAL CONTROL; SOUTH CAROLINA BOARD OF HEALTH AND ENVIRONMENTAL CONTROL,

Petitioners,

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Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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PETITIONERS' SUPPLEMENTAL BRIEF

In its brief as *amicus curiae*,[1] the United States acknowledges that the question presented in this case is one of

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[1] On March 17, 1997, this Court entered an order inviting the Solicitor General to file a brief in this case expressing the views of the United States. Page proofs of the United States' brief were filed with the Court on May 30, 1997, and served on the parties by mail on that day. This supplemental brief is filed pursuant to Supreme Court Rule 15.8.

statutory construction: whether the Resource Conservation and Recovery Act ("RCRA") and the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA") have created federal standards applicable to South Carolina's hazardous waste program that operate in place of those of the dormant Commerce Clause. But the government sidesteps the circumstances of South Carolina's program that bear on that statutory question, using three separate pathways to that end. Each is unavailing. First, the United States avers that the Environmental Protection Agency ("EPA") "has not specifically addressed or approved any of the South Carolina provisions" under RCRA. Gov't Br. at 12. In fact, however, EPA acted in 1995 to approve modifications to South Carolina's program in express reliance on one of the provisions, *id.* at 13-14, and each of the provisions is included in South Carolina's approved program and thus would operate in lieu of the federal program absent the injunction at issue here. Second, the United States suggests that EPA would not apply the RCRA commerce standard in a manner which varies from dormant Commerce Clause criteria. *Id.* at 15-16. In actuality, EPA did just that regarding South Carolina's program in 1985, and it has done so with other State's programs as well. *Id.*, at 5 n.2 and 6 & n.3 (South Carolina's program and Maine's program). Third, the United States advises that referral to EPA under the primary jurisdiction doctrine is not appropriate to address "questions of constitutional law." *Id.* at 19. However, the statutory and regulatory issues must be resolved as a first step, to determine whether any constitutional issues arise. These issues of statutory and regulatory interpretation and application are what would be referred. Pet. at 28-29, Pet. Reply at 8-9.

The United States' diversions constitute analytical dead ends. At the end of the maze constructed by the government, an important constitutional question remains. Under the Fourth Circuit's ruling, South Carolina laws at issue could be *valid* under RCRA, but *invalid* by operation of

the dormant Commerce Clause, at the same time. This Court has previously acknowledged the potential impact of RCRA to displace dormant Commerce Clause analysis. *Chemical Waste Mgmt. v. Hunt*, 504 U.S. 334, 346 n.9 (1992); *see also C&A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383, 409-410 (1994) (O'Connor, J., concurring). The question is substantial and recurring, is now squarely presented, and warrants this Court's review.

I. THIS CASE SQUARELY PRESENTS THE QUESTION WHETHER THE DORMANT COMMERCE CLAUSE APPLIES TO A STATE HAZARDOUS WASTE REGULATORY PROGRAM APPROVED BY EPA UNDER RCRA

Section 3006 of RCRA provides that a State hazardous waste program must be "consistent with the . . . State programs applicable in other states" in order to receive RCRA approval, and that upon EPA's approval a State is "authorized to carry out such program in lieu of the Federal program." 42 U.S.C. § 6926(b).[2] South Carolina operates an approved RCRA program: the State initially received approval in 1985 (Pet. 6), and since that time its program has operated "in lieu of" federal law. The elements of South Carolina's program challenged here were added in 1989 and 1990, were submitted to EPA in connection with the State's biannual reports of changes to its program, and are part and parcel of the approved pro-

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[2] If a State submits for approval a hazardous waste regulatory program that satisfies the "consistency" requirements of Section 3006 of RCRA, 42 U.S.C. § 6926, EPA must approve that program. There is an implication in the United States' brief that EPA has discretion in the matter (*see* Gov't Br. at 4, commenting that "EPA may authorize a State . . ."), but the statute specifies that "[s]uch State is authorized to carry out such program in lieu of the Federal program . . . unless [specific findings are made]." 42 U.S.C. § 6926(b). There is no discretion. See 53 Fed. Reg. 16,264, 16,265 (May 6, 1988) (bottom portion of middle column) (EPA's comments on approving Maine's program).

gram.[3] The United States does not controvert that South Carolina duly advised EPA of the provisions at issue, or that the provisions are part of the State's program, or that EPA has acted on modifications to South Carolina's program in light of the provisions.

EPA in 1995 approved numerous changes to South Carolina's program that illustrate these facts. 60 Fed. Reg. 42,046 (Aug. 15, 1995). These changes came about because of the Hazardous and Solid Waste Amendments of 1984 ("HSWA"), Pub. L. No. 98-616, 98 Stat. 3221 (Nov. 8, 1984), which called for a significant revamping of State RCRA programs. EPA developed a checklist for purposes of HSWA that identified as "clusters" each of the changes that were contemplated by that amendment to RCRA. After the enactment of HSWA, but before approval of South Carolina's HSWA modifications in 1995, the regulatory authority over hazardous waste had been split. South Carolina's basic program operated in lieu of federal law, but the HSWA requirements were implemented by EPA. *See* 42 U.S.C. § 6926(c)(4).[4] One of the statutes involved in

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[3] The challenged provisions which the United States refers to as "blacklisting" laws, Gov't Br. 3, were in fact a considered attempt by the State to assure that South Carolina had adequate capacity "within the State or outside the State in accordance with an interstate agreement" for wastes "expected to be generated within the State"—assurances that appear on their face to be contemplated by Section 104(c)(9) of CERCLA, 42 U.S.C. § 9604(c)(9), Pet. App. 108a, as a necessary precondition for the State to remain eligible for federal remedial actions under CERCLA.

By contrast, *Chemical Waste Mgmt., Inc. v. Templet*, 967 F.2d 1058 (5th Cir. 1992), dealt summarily with restrictions in Louisiana law on disposal of foreign-derived waste within that State. The provisions of CERCLA thus had no bearing on *Templet*, and as to RCRA the Fifth Circuit relied entirely on the Fourth Circuit's 1991 decision at Pet. App. 50a-79a.

[4] This portion of the statute provides:

(4) In the case of a State permit program for any State which is authorized under subsection (b) of this section or under this

this case, S.C. Code Ann. § 44-56-60, is the State's basic permitting authority. In EPA's action in 1995, it was cited a number of times as authority for South Carolina's HSWA clusters approved by EPA. Moreover, subsection (a) of that Section codifies South Carolina's restrictions on total landfilling of hazardous waste, enacted in Act No. 590 of 1990. *See* Pet. 8. As noted previously, Pet. Reply at 5 & n.3, EPA expressly relied on Section 44-56-60(a) several times in approving the State's program revisions to implement HSWA. And, EPA could not have taken its 1995 action lightly because approval of the State's HSWA changes meant they displaced the correlative federal HSWA provisions.

It is true that EPA in 1995 did not indicate it analyzed S.C. Code Ann. § 44-56-60(a) or the other challenged provisions to determine whether they "unreasonably" affected interstate commerce within the meaning of its "consistency" regulation, 40 C.F.R. § 271.4(a). But, it is also true that EPA extended its approval of South Carolina's program, citing challenged provisions as authority, and those provisions are part of South Carolina's program. Thus, the United States' assertion that "EPA has not expressly approved any of these challenged provisions," Gov't Br. at 13; *see also id.* at 7, 8, 12, 14, and 15, rests on a distinction so fine as to be imperceptible. The authorization created by RCRA Section 3006 is addressed to the State's *program*. South Carolina operates an approved state program, "in lieu of the Federal program." It obtained the required statutory approval in 1985, has at all times kept EPA apprised of the changes in and

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subsection, until such program is amended to reflect the amendments made by the Hazardous and Solid Waste Amendments of 1984 and such program amendments receive interim or final authorization, the Administrator shall have the authority in such State to issue or deny permits or those portions of permits affected by the requirements and prohibitions established by the Hazardous and Solid Waste Amendments of 1984. The Administrator shall coordinate with States the procedures for issuing such permits.

additions to its program, has never had approval withdrawn, and has in fact had the approval extended while this case has been pending (including with respect to one of the laws being challenged). Under RCRA, the South Carolina laws at issue here would, absent the district court's injunction, operate in lieu of federal law.

In this context, a dormant Commerce Clause challenge to any part of the State's program should not proceed unless the permissibility of the challenged provisions under the RCRA standard for state regulation of commerce is addressed *first*. If the RCRA standard permits South Carolina to do what it has done, the *dormant* Commerce Clause challenge should be displaced. It is a patent dodge for the United States to assert that the question of whether "the regulatory 'consistency' standard should affect judicial scrutiny of [each] provision under the dormant Commerce Clause is not properly presented." Gov't Br. at 14. South Carolina's approved RCRA program has been struck down by a permanent injunction based on the dormant Commerce Clause. Before reaching such a result, the effect of the RCRA commerce standard on such a challenge not only can, but logically *must*, be considered.

Thus, the Fourth Circuit correctly saw the need to confront the RCRA issue. Its error was in the result of that confrontation, and in its holding on the merits that no application of the RCRA consistency standard could save any of the challenged provisions, because "we must apply the Constitution's dictates." Pet. App. 15a. The State's petition seeks a decision on the statutory question. The Fourth Circuit's error is properly before this Court.

II. AS ADMINISTERED BY EPA, RCRA CREATES A STANDARD DISTINCTLY DIFFERENT FROM THE DORMANT COMMERCE CLAUSE

The United States acknowledges that in enacting RCRA's requirement that a State program be "consistent with the . . . State programs applicable in other States," Congress intended to address the permissible effects of

state hazardous waste laws on interstate commerce. Gov't Br. at 15-16. Such intent is confirmed in the legislative history of RCRA. *See* Pet. at 17. In the United States' view, however, "the most natural interpretation of RCRA's requirement that state programs be consistent" is that it merely restates the existing dormant Commerce Clause restrictions. Gov't Br. at 16. By urging an interpretation that results in no conflict between RCRA and the dormant Commerce Clause, the United States seeks to assume away the issues in this case. *See Northwest Airlines, Inc. v. County of Kent*, 510 U.S. 355, 373 (1994).

But EPA has not interpreted RCRA in this way, and it is EPA's view of the statute that matters. *Cf. Meghrig v. KFC Western Inc.*, 116 S. Ct. 1251, 1254 (1996) ("Chief responsibility for the implementation and enforcement of RCRA rests with [EPA] . . . ."); *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). EPA has determined that RCRA creates a more permissive standard than would apply under the dormant Commerce Clause. Thus, EPA's regulation governing "consistency" uses terms distinct from those applicable under the dormant Commerce Clause, and permits state restrictions which do not "unreasonably restric[t], imped[e], or operat[e] as a ban on the free movement across the State border of hazardous waste." 40 C.F.R. § 271.4(a). There is no doubt about this interpretation; EPA has determined that some State programs that would surely violate the dormant Commerce Clause are nonetheless valid under Section 271.4(a). One example comes from South Carolina's own program, Pet. at 6 n.1, Pet. Reply at 2-3, and another is an example cited by the United States of EPA's approval of Maine's program. Gov't Br. at 5 n.2 (citing 53 Fed. Reg. 16,264, 16,265 (1988) (EPA approval of disposal fee structure imposing double fees on waste derived from outside the State)).[5]

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[5] The United States correctly notes that in allowing what the dormant Commerce Clause would prohibit, EPA "does not purport

In this context, an *amicus* brief from the United States asserting that Section 271.4(a) and the dormant Commerce Clause create the same standard, Gov't Br. at 16, does not supplant EPA's considered application of the statute it administers. *See Massachusetts v. Blackstone Valley Elec. Co.*, 67 F.3d 981, 988 (1st Cir. 1995); Pet. Reply at 9-10 & n.8; *see also Northwest Airlines*, 510 U.S. at 366-67. If EPA were permitted to exercise its primary jurisdiction, an assessment of ETC's challenge under the RCRA commerce standard could produce a result different from that which has been reached, erroneously, under the dormant Commerce Clause.

III. THE STATE'S PROGRAM CANNOT BE APPROVED AND VALID UNDER RCRA AND YET BE STRICKEN DOWN UNDER THE DORMANT COMMERCE CLAUSE

In contrast to the United States' views as *amicus*, the Court of Appeals refused to address, or to allow EPA to address, whether Section 271.4(a) created a standard different from that of the dormant Commerce Clause, because the Fourth Circuit decided that *no* application of the consistency rule could affect the dormant Commerce Clause. That decision failed to give effect to this Court's precedents under the dormant Commerce Clause.

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to adjudicate constitutional questions under the dormant Commerce Clause." Gov't Br. at 16. South Carolina has never suggested that EPA should do so. Only a court has jurisdiction to conclude that the RCRA statutory standard displaces the dormant Commerce Clause. But at the same time, the dormant Commerce Clause cannot apply to matters governed by federal statute. Thus it must be determined that the challenged provisions are not "consistent" under RCRA (as implemented in Section 271.4(a)) before any dormant Commerce Clause challenge can properly go forward. That determination conceptually involves a ruling on the interpretation of RCRA and on EPA's implementing regulation, both of which could be accomplished by this Court, *see supra*, p. 6, and on an application of the statutory standards to South Carolina's program, which should be addressed by EPA on referral under the primary jurisdiction doctrine.

Once federal law has authorized a State's actions, the dormant Commerce Clause does not independently restrict them. *Prudential Ins. Co. v. Benjamin*, 328 U.S. 408 (1946). And authorization may stem directly from Congress, or from valid actions of federal agencies. *White v. Massachusetts Council of Constr. Employers, Inc.*, 460 U.S. 204, 215 (1983); *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 156 (1982).

As applied by EPA, RCRA creates a more permissive rule respecting effects of state hazardous waste regulatory programs on interstate commerce than does the dormant Commerce Clause. To that extent, it is "unmistakably clear" that the more restrictive criteria of the dormant Commerce Clause have been displaced. *South-Central Timber Dev., Inc. v. Wunnicke*, 467 U.S. 82, 91-92 (1984). Seeing its laws permanently struck down, South Carolina requests that this Court grant review and consider the Fourth Circuit's grounds for that action.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

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In the Supreme Court of the United States

OCTOBER TERM, 1996

SOUTH CAROLINA, ET AL., PETITIONERS

v.

ENVIRONMENTAL TECHNOLOGY COUNCIL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTIONS PRESENTED

Section 3006 of the Resource Conservation and Recovery Act of 1976 (RCRA), 42 U.S.C. 6926, authorizes the Environmental Protection Agency (EPA) to allow States to implement their own hazardous waste programs that are consistent with the federal program. Section 104(c)(9) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C. 9604(c)(9), as added by Section 104(k) of the Superfund Amendments and Reauthorization Act of 1986 (SARA), Pub. L. No. 99-449, 100 Stat. 1621, conditions the payment of certain cleanup funds within a State on EPA approval of the State's plan for long-term treatment or disposal of the hazardous wastes produced within its borders. The questions presented are:

1. Whether Section 3006 of RCRA or Section 104(c)(9) of SARA indicates an unmistakably clear congressional intent to allow States to discriminate against interstate commerce in hazardous wastes.

2. Whether South Carolina's cap on land disposal of hazardous wastes and its "demonstration of need" requirement for new and expanded hazardous waste facilities, both of which differentiate between in-state and out-of-state wastes, are "neutral" provisions that must be considered separately from other provisions of South Carolina's hazardous waste program.

3. Whether the district court abused its discretion in declining to refer this case to EPA under the "primary jurisdiction" doctrine.

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In the Supreme Court of the United States

OCTOBER TERM, 1996

No. 96-1102

SOUTH CAROLINA, ET AL., PETITIONERS

v.

ENVIRONMENTAL TECHNOLOGY COUNCIL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This brief is submitted in response to the Court's order inviting the Solicitor General to express the views of the United States.

STATEMENT

Respondent Environmental Technology Council (formerly Hazardous Waste Treatment Council) brought this challenge under the Commerce Clause, U.S. Const. Art. I, § 8, Cl. 3, to a series of South Carolina statutory and regulatory provisions governing the treatment and disposal of hazardous wastes in that State. The district court granted a preliminary injunction against enforcement of the challenged provisions, Pet. App. 82a-104a, and that injunction was, in relevant part, upheld by the court of appeals, *id.*

at 50a-81a. The United States participated in that appeal as *amicus curiae* on behalf of respondent.[1]

On remand, the district court granted summary judgment for respondent and permanently enjoined the challenged provisions. Pet. App. 28a-49a. The court of appeals affirmed. *Id.* at 1a-27a. The United States did not participate in that second appeal.

1. South Carolina's Hazardous Waste Program

Five provisions of South Carolina's hazardous waste program have been invalidated. The first, Executive Order No. 89-17, issued in April 1989, declared that, because the "volume of hazardous waste disposed of in South Carolina is disproportionately out-of-state waste," and because other States have imposed "barriers and restraints against the disposal of hazardous waste within their own borders," hazardous waste treatment facilities in South Carolina are prohibited from accepting waste originating in a State that does not permit the disposal of that waste within its borders. Pet. App. 142a-147a. Under that provision, all generators of wastes in certain States were effectively "blacklisted" from using hazardous waste facilities in South Carolina.

The second provision, issued in July 1989, is Executive Order No. 89-25, which establishes quotas for the disposal in South Carolina of out-of-state wastes. Pet. App. 140a. That order requires all hazardous waste facilities to reserve a certain capacity for in-state wastes and to limit the capacity of wastes accepted from any single other State. *Ibid.*

The third provision, Regulation 61-99 of the South Carolina Department of Health and Environmental Control (DHEC), took effect in January 1990. It requires a "demonstration of need" before any applicant can receive a permit to establish or expand a

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[1] Respondent has lodged copies of that brief with this Court. Br. in Opp. 3 n.7.

hazardous waste management facility. Pet. App. 134a-137a. This need can be demonstrated only by reference to the volume of in-state wastes. *Id.* at 134a-136a.

The final two provisions are statutes enacted in 1989 and 1990. In Act No. 196 (1989 S.C. Acts 1575), the South Carolina legislature codified the "blacklisting" provision of Executive Order No. 89-17. Section 9 of the Act, codified at S.C. Code Ann. § 44-56-130(4)-(6) (Law. Co-op. Supp. 1996), prohibits facilities in South Carolina from accepting hazardous waste from generators in another State if that State has prohibited the treatment, storage or disposal of that waste within its borders or has not entered into an interstate or regional agreement for the safe treatment of hazardous wastes. Pet. App. 127a-128a. Section 5 of the Act, S.C. Code Ann. § 44-56-205 (Law. Co-op. Supp. 1996), codifies preferences for in-state wastes, providing that "[a]ll hazardous waste treatment and disposal facilities in South Carolina shall give preference to hazardous waste generators within the State of South Carolina for treatment and disposal of hazardous materials." Pet. App. 127a.

Act No. 590 (1990 S.C. Acts 2495) discriminates against out-of-state wastes by establishing a floor for the disposal of in-state wastes and a ceiling for the disposal of out-of-state wastes. Section 2 of the Act, codified at S.C. Code Ann. § 44-56-60(a) (Law. Co-op. Supp. 1996), requires each hazardous waste facility in South Carolina to reserve for in-state wastes at least the same land disposal capacity that it allocated for in-state wastes during the previous year and limits the burial of out-of-state wastes to the amount buried during the previous year. Pet. App. 132a. Act No. 590 also sets a statewide cap on the total amount of hazardous waste that can be disposed of in South Carolina landfills, and provides that that cap can be exceeded by a showing related to the amount of in-

state, but not out-of-state, waste disposed of during the preceding year. *Ibid.* The legislative "findings" supporting Act No. 590 (see § 1, codified at S.C. Code Ann. § 44-56-59(A)(2)-(3) (Law. Co-op. Supp. 1996)) candidly state that it is "essential that [South Carolina's] limited waste treatment and disposal capacity * * * be preserved, ready and available to ensure that the needs of South Carolina are met first," and that hazardous waste treatment and disposal facilities in South Carolina "must give preference to hazardous waste generators within the State." Pet. App. 130a.

2. Federal Statutory and Regulatory Framework

South Carolina's hazardous waste laws were enacted against a backdrop of three federal statutes addressing the national problem of hazardous waste treatment, storage and disposal: the Resource Conservation and Recovery Act of 1976 (RCRA), 42 U.S.C. 6921-6939b; the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), 42 U.S.C. 9601 *et seq.*; and the Superfund Amendments and Reauthorization Act of 1986 (SARA), Pub. L. No. 99-449, 100 Stat. 1613.

a. RCRA directs EPA to establish a comprehensive "cradle to grave" system regulating the generation, transport, storage, treatment and disposal of hazardous wastes. See 42 U.S.C. 6922-6925. Under Section 3006 of RCRA, 42 U.S.C. 6926, EPA may authorize a State to implement its own hazardous waste program "in lieu of" the federal program, as long as the state program (1) is "equivalent to" the federal program, (2) is "not [in]consistent with" the federal program or other state programs, and (3) provides for "adequate enforcement" of compliance with federal requirements. 42 U.S.C. 6926(b). EPA regulations interpreting the "consistency" requirement state that:

> Any aspect of the State program which unreasonably restricts, impedes, or operates as a ban on the free movement across the State border of hazardous wastes from or to other States for treatment, storage, or disposal at facilities authorized to operate under the Federal or an approved State program shall be deemed inconsistent.

40 C.F.R. 271.4(a).[2]

b. While RCRA provides hazardous waste disposal management standards, CERCLA primarily addresses abandoned and inactive waste disposal sites. CERCLA provides a mechanism for cleaning up contaminated sites, 42 U.S.C. 9606, and imposes the costs of the cleanup on those responsible for the contamination, 42 U.S.C. 9607. Under CERCLA, EPA may itself undertake response actions using the Hazardous Substances Superfund, 42 U.S.C. 9604, then seek to recover its costs from responsible parties, 42 U.S.C. 9607(a), or it can seek to require responsible parties to undertake response actions, through administrative orders or judicial injunction, 42 U.S.C. 9606(a).

c. As part of SARA, Congress enacted Section 104(c)(9) of CERCLA, which establishes state

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[2] In notices approving state programs, EPA has explained that RCRA Section 3006 does not require the agency to conduct a Commerce Clause analysis in determining whether a state program satisfies the "consistency" criterion. In the notice announcing final approval of South Carolina's RCRA program, EPA explained that it was "not required to adopt the Constitutional test for impediments or restrictions in interpreting its own regulations, and decline[d] to do so here." 50 Fed. Reg. 46,437, 46,439 (1985) (Pet. App. 117a); see also 53 Fed. Reg. 16,264, 16,265 (1988) ("[T]he Agency does not believe that it is required either by 40 C.F.R. 271.4 or by RCRA Section 3006 to adjudicate the constitutionality of a state statute in the absence of any definitive judicial decision applicable to the statute at hand.") (approving Maine's program).

hazardous waste capacity requirements. 42 U.S.C. 9604(c)(9). This provision prohibits the United States from providing money for any remedial actions in a given State unless that State assures EPA that it has adequate capacity to treat, destroy, or dispose of the hazardous wastes projected to be produced in the state for a 20-year period. 42 U.S.C. 9604(c)(9)(A). This capacity need not be provided entirely within the State; it may also be provided by out-of-state facilities in accordance with "an interstate agreement or regional agreement or authority." 42 U.S.C. 9604(c)(9)(B).

3. EPA Approvals and Authorizations in South Carolina

Pursuant to RCRA Section 3006 and CERCLA Section 104(c)(9), EPA has authorized South Carolina to operate its own hazardous waste program and has approved its Capacity Assurance Plan (CAP), making it eligible for federal remedial cleanup funds.

a. EPA authorized South Carolina to operate its hazardous waste program under RCRA Section 3006 in 1985, several years before the five invalidated provisions took effect. See Pet. App. 110a. That 1985 review is EPA's only comprehensive evaluation of South Carolina's hazardous waste program and the only instance in which the agency has made explicit findings with respect to the "consistency" of any aspect of that program.[3] EPA did notify South

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[3] Before granting final authorization, EPA solicited public comment on whether a recently-enacted hazardous waste fee provision (not at issue in this case) should be deemed "inconsistent" under 40 C.F.R. 271.4 because it imposed a higher fee for land disposal of out-of-state hazardous wastes than for hazardous wastes generated in-state. See 50 Fed. Reg. 37,385 (1985). EPA ultimately determined that the fee provision satisfied the "consistency" criterion because the evidence showed that the fee did not "in fact" unreasonably restrict or

Carolina in 1989 of potential "consistency" problems with Executive Order No. 89-17, which requires that hazardous waste facilities give a preference to in-state wastes. In response to EPA's request, South Carolina's Attorney General submitted an opinion that the Order satisfied the "consistency" regulations. 1 C.A. App. 381a. EPA never responded to that opinion or took any further action.

Since then, in 1993, 1994, and 1995, EPA has approved three "clusters" of revisions and modifications to South Carolina's RCRA program.[4] None of EPA's approval notices specifically addressed or approved the provisions challenged in this case.

b. In May 1990, EPA approved South Carolina's CAP pursuant to CERCLA Section 104(c)(9). 1 C.A. App. 246. At that time, EPA's policy was to approve a plan if it met three criteria: it provided "reasonable assurance" that the State would have adequate capacity to manage its hazardous wastes for the next 20 years; it demonstrated the State's "commitment

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impede the free flow of hazardous wastes across state lines. Pet. App. 112a-113a.

[4] EPA's regulations establish procedures for submitting proposed revisions and modifications to EPA for approval. See 40 C.F.R. 271.21. In particular, States are required to modify their programs periodically to reflect changes in the federal RCRA program. 40 C.F.R. 271.21(e). These periodic submissions are referred to as "clusters." See 51 Fed. Reg. 33,712, 33,714 (1986). South Carolina's submissions that EPA approved in 1993, 1994, and 1995 were "clusters" designed to respond to changes in RCRA. While those submissions were never made part of the record in this case, EPA's approvals of those submissions appear at 60 Fed. Reg. 42,046 (1995); 59 Fed. Reg. 60,910 (1994); and 58 Fed. Reg. 7865 (1993).

EPA's regulations also establish procedures for withdrawing program authorization. See 40 C.F.R. 271.11-271.23. Neither the EPA nor any other party has initiated a withdrawal proceeding.

and capability to carry out the plan"; and it "document[ed] interstate and/or regional agreements for imports and exports." EPA Office of Solid Waste and Emergency Response, Directive 9010.00a (Oct. 16, 1989), at 2-3 (OSWER Directive). Although South Carolina attached copies of several of the challenged provisions to its CAP submission,[5] EPA's CAP review process did not require the agency to analyze, let alone approve, any of those provisions. Accordingly, EPA's approval letter stated simply that South Carolina's submission was acceptable for purposes of Section 104(c)(9) and that the State therefore would be eligible for federal cleanup funds. 1 C.A. App. 246.[6]

Although the decision in this case has enjoined specific provisions of South Carolina's laws that discriminate against out-of-state wastes, the State continues to operate its hazardous waste program. See 61 Fed. Reg. 18,502 (1996) (EPA approval of South Carolina's revisions to its hazardous waste program). In addition, it retains its eligibility under SARA to receive federal funds for remedial cleanup projects.

4. This Litigation

Respondent filed suit in June 1990, alleging that South Carolina's hazardous waste program violated the Commerce Clause and seeking injunctive relief. The district court granted respondent a preliminary injunction, enjoining the enforcement of each of the challenged South Carolina laws. Pet. App. 82a-104a.

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[5] Attached to South Carolina's 1989 CAP submission were copies of Act No. 196, Executive Order Nos. 89-17 and 89-25, and an interim version of DHEC Reg. 61-99. 1 C.A. App. 290, 333-369. Act No. 590 was not yet in effect.

[6] Less than two weeks later, in approving Alabama's CAP, EPA explained that its CAP review focused on issues of waste management capacity and did not include Alabama's list of "banned" or blacklisted States, which was "beyond the scope" of its review of Alabama's CAP. 1 C.A. App. 496.

It found that the intent and likely effect of the challenged provisions were to interfere with interstate commerce in hazardous waste, *id.* at 102a-103a, and it rejected petitioners' argument that the provisions were immune from Commerce Clause challenge because EPA had approved South Carolina's hazardous waste management program, *id.* at 101a. The court of appeals affirmed the district court's preliminary injunction, except as to DHEC Regulation 61-99, and it remanded the case. *Id.* at 50a-81a. The court of appeals concluded that respondent had a substantial argument that DHEC Regulation 61-99 violated the Commerce Clause, but directed the district court on remand to consider more fully the balance of hardships that would result from a preliminary injunction of that regulation. *Id.* at 64a.

b. On remand, the district court granted summary judgment for respondent on the ground that all five challenged provisions violated the Commerce Clause. Pet. App. 28a-49a. It analyzed the provisions as "five interrelated components," *id.* at 33a, "work[ing] together to compose an overall discriminatory program," *id.* at 44a, and found that the "actual purpose of the program was to discriminate," *id.* at 43a. It therefore rejected petitioners' efforts to salvage the allegedly "neutral" aspects of the land disposal quotas established by Act No. 590, holding that "a discriminatory program cannot be pursued into its otherwise valid but constituent parts." *Id.* at 46a (citing *West Lynn Creamery, Inc.* v. *Healy*, 512 U.S. 186 (1994)). In addition, it enjoined DHEC Regulation 61-99 as an "obvious effort to hoard the economic resources of [the] state and to isolate th[e] state from interstate commerce." *Id.* at 48a. The district court also denied petitioners' motion to stay the case and refer it to EPA under the "primary jurisdiction" doctrine, noting that the constitutional issues respondent raised were not "those to which EPA

could conceivably lend some degree of expertise." *Id.* at 29a.

c. The court of appeals affirmed. Pet. App. 1a-27a. It found no evidence in the language or legislative history of RCRA, CERCLA, or SARA to support petitioners' contention that "Congress intended to permit the states, directly or by EPA authorization, to engage in actions otherwise violative of the Commerce Clause." *Id.* at 13a-14a. It specifically rejected petitioners' argument that Congress contemplated that EPA's "consistency" regulations would displace a constitutional Commerce Clause analysis. *Id.* at 14a-15a. As an additional basis for rejecting that argument, the court concluded that, in any event, "EPA has not expressly approved any of the contested South Carolina laws." *Id.* at 17a; *id.* at 11a n.11 ("we disagree with South Carolina's contention that EPA has specifically addressed and authorized some of the challenged provisions").

Applying traditional Commerce Clause principles, the court concluded that the challenged provisions discriminate in effect and in purpose, Pet. App. 19a, and are not justified by any legitimate state concerns that could not be served by nondiscriminatory alternatives, *id.* at 20a-22a. In addition, it declined to sever and preserve the overall cap on land disposal of hazardous wastes imposed by Act No. 590 and the "needs" requirement imposed by DHEC Regulation 61-99, concluding that those provisions were "not as evenhanded and neutral as the state would have the court believe." *Id.* at 23a-26a. Alternatively, the court held that, even if Act No. 590's overall cap were nondiscriminatory, it would not be severable, under applicable principles of state law, from the unconstitutional portions of the Act. *Id.* at 24a n.21. Finally, the court of appeals held that the district court did not abuse its discretion by denying petitioners' motion to stay the case and refer it to

EPA under the "primary jurisdiction" doctrine. *Id.* at 27a.

DISCUSSION

"It has long been accepted that the Commerce Clause * * * directly limits the power of the States to discriminate against interstate commerce." *New Energy Co.* v. *Limbach*, 486 U.S. 269, 273 (1988). Under this conception of the "negative" or "dormant" Commerce Clause, state actions that discriminate facially, in practical effect or in purpose, are subject to a "virtually *per se* rule of invalidity." *Wyoming* v. *Oklahoma*, 502 U.S. 437, 454-455 (1992) (quoting *Philadelphia* v. *New Jersey*, 437 U.S. 617, 624 (1978)); *Camps Newfound/Owatonna* v. *Harrison*, No. 94-1988, 1997 WL 255351, at *16 (May 19, 1997). To sustain a discriminatory action, a State must demonstrate that the action "is demonstrably justified by a valid factor unrelated to economic protectionism," *New Energy Co.*, 486 U.S. at 274, and that there are no "nondiscriminatory alternatives adequate to preserve the local interests at stake," *Chemical Waste Management, Inc.* v. *Hunt*, 504 U.S. 334, 342 (1992) (quoting *Hunt* v. *Washington State Apple Advertising Comm'n*, 432 U.S. 333, 353 (1977)). These principles apply with full force to the interstate commerce in hazardous wastes. See, *e.g.*, *C & A Carbone, Inc.* v. *Town of Clarkstown*, 511 U.S. 383, 389 (1994); *Oregon Waste Sys., Inc.* v. *Department of Envt'l Quality*, 511 U.S. 93, 100 (1994); *Chemical Waste Management*, 504 U.S. at 340 n.3; *Fort Gratiot Sanitary Landfill, Inc.* v. *Michigan Dep't of Natural Resources*, 504 U.S. 353, 359 & n.3 (1992); *Philadelphia*, 437 U.S. at 622-623.

Petitioners do not assert that the quotas on out-of-state wastes (Exec. Order No. 89-25), the "blacklisting" provisions (Act No. 196 and Exec. Order No. 89-17), the preference for in-state wastes (Act. No. 196), or the ceiling on the disposal of out-of-state

wastes and floor on the disposal of in-state wastes (Act No. 590) are nondiscriminatory. Nor do they challenge the court of appeals' conclusion that there are nondiscriminatory alternatives that would effectively address the State's legitimate concerns for the health, safety, and welfare of its citizens. Instead, petitioners assert that RCRA, CERCLA, and SARA somehow indicate Congress's intent to allow States to discriminate against interstate commerce in hazardous wastes. Pet. 12-26.

That argument fails for two reasons. First, as the court of appeals found, Pet. App. 17a, EPA has not specifically addressed or approved any of the South Carolina provisions at issue here. Accordingly, this case does not present the question whether actual EPA approval could be interpreted to show congressional intent to allow States to erect otherwise unconstitutional barriers to out-of-state wastes. Second, even if that question were properly presented here, the Fourth Circuit correctly held that nothing in RCRA, CERCLA, or SARA evinces an "unmistakably clear" congressional intent to allow state discrimination against interstate commerce. Petitioners' additional assertions are similarly without merit. Both lower courts correctly concluded that the overall cap on land disposal of hazardous wastes and the "needs" requirement improperly discriminate against out-of-state wastes, and both courts correctly rejected petitioners' contention that this matter should be referred to EPA under the "primary jurisdiction" doctrine. Because the court of appeals' decision that those five provisions of South Carolina's hazardous waste program impermissibly discriminate against interstate commerce in hazardous wastes is correct and does not conflict with any decision of this Court or of another court of appeals, further review by this Court is not warranted.

1. In the exercise of its plenary authority to regulate interstate commerce, Congress may authorize or validate a state law or regulation that would otherwise offend the Commerce Clause. *South-Central Timber Dev., Inc.* v. *Wunnicke*, 467 U.S. 82, 87-88 (1984). Congress's intent to do so, however, must be "expressly stated" or "unmistakably clear." *Id.* at 91; *Northwest Airlines, Inc.* v. *County of Kent*, 510 U.S. 355, 373-374 (1994); *Maine* v. *Taylor*, 477 U.S. 131, 139 (1986); *Sporhase* v. *Nebraska*, 458 U.S. 941, 960 (1982); *C & A Carbone*, 511 U.S. at 408 (O'Connor, J., concurring). Petitioners contend, Pet. 15-23, that RCRA, CERCLA, and SARA demonstrate Congress's "unmistakably clear" intent to allow EPA to approve and thereby validate state hazardous waste programs that discriminate against out-of-state wastes. They further contend that, pursuant to those statutes, EPA expressly approved the five South Carolina provisions challenged here. Pet. 24-26; Reply Br. 4-7.

a. We address petitioners' second contention first. As the Fourth Circuit found, Pet. App. 17a, EPA has not expressly approved any of these challenged provisions. Nor has it made any findings as to their "consistency." The only time EPA has evaluated South Carolina's overall program for consistency, equivalency, and enforcement capabilities was in 1985 when it granted final authorization for South Carolina's hazardous waste program. At that time, none of the challenged provisions was in effect. Of the 1993, 1994, and 1995 EPA approvals of modifications to South Carolina's program, only the 1995 approval notice mentions one of the challenged provisions, and then only in a context unrelated to discrimination against out-of-state wastes. See 60 Fed. Reg. 42,046, 42,048, 42,049, 42,050 (1995). As the court of appeals correctly noted, Pet. App. 11a n.11, the 1995 approval notice cited S.C. Code Ann. § 44-56-60(a), the section amended by Act No. 590, only for its relevance

to other aspects of the federal program (*e.g.*, location standards for salt domes, salt beds, underground mines, and caves). Thus, nothing in the record indicates that South Carolina sought, or that EPA granted, approval for the specific provisions challenged here, and the question whether EPA's approval of a state provision under the regulatory "consistency" standard should affect judicial scrutiny of that provision under the dormant Commerce Clause is not properly presented.

Nor did EPA's approval of the State's CAP submission in 1990 "focus" on the effects of the challenged authorities on interstate commerce, as petitioners claim. Pet. 23 & n.14. EPA's 1990 CAP review was a narrow one, focusing solely on the State's capacity to handle wastes generated *in-state*, not on its laws governing the treatment or disposal of *out-of-state* wastes. In measuring that capacity, EPA considered only in-state waste facilities and out-of-state capacity guaranteed by "an interstate agreement or regional agreement or authority." 42 U.S.C. 9604(c)(9)(B).[7] Thus, in approving South Carolina's CAP submission, EPA did nothing more than deter-

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[7] As we explained in our *amicus* brief in the court of appeals, the narrow scope of the CAP review made consideration of provisions designed to reduce out-of-state wastes irrelevant:

> In effect, for purposes of determining whether a state has met its capacity assurance obligation, EPA assumes that there are no imports except those that occur pursuant to an interstate or regional agreement. * * * Thus, because the provisions of South Carolina law at issue here are directed at reducing the total amount of interstate waste imported for treatment, storage, or disposal, not at changing the terms of its interstate agreements with respect to capacity, these provisions were not relevant to EPA's approval of South Carolina's capacity assurance plan.

Govt. C.A. Br. 31 n.17.

mine that South Carolina had made adequate arrangements for the disposal or storage of wastes generated within its borders. It did not review, much less approve, the State's policies with regard to out-of-state wastes.[8]

b. Even if the question whether EPA approval would displace judicial Commerce Clause analysis were properly presented for this Court's review, it is clear that nothing in RCRA, CERCLA, or SARA suggests any congressional intent to permit States to discriminate against interstate commerce in hazardous wastes.

i. Petitioners contend, Pet. 15-18, that Congress has intentionally displaced the dormant Commerce Clause by delegating to EPA, under Section 3006 of RCRA, 42 U.S.C. 6926, the authority to authorize States to operate hazardous waste programs. See Pet. 15-18. That argument finds no support in the statute or in this Court's decisions. It has been rejected by the Fifth Circuit, see *Chemical Waste Management, Inc.* v. *Templet*, 967 F.2d 1058, 1059-1060 (1992), cert. denied, 506 U.S. 1080 (1993), as well as the court below, with no contrary decisions from any other court of appeals.

While RCRA Section 3006 authorizes EPA to allow a State to administer and enforce its own hazardous waste program "in lieu" of the federal program, nothing in RCRA indicates that Congress contemplated that EPA would permit States to enact programs that discriminate against out-of-state wastes. To the contrary, the most natural interpretation of RCRA's

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[8] In claiming otherwise (Pet. 23 n.14), petitioners misread a 1988 EPA guidance document, which clarifies that EPA would use the procedures for withdrawal of a State's RCRA program, rather than the CAP review process, to address problems with "unreasonable restrictions on interstate waste movements." Policy Regarding Hazardous Waste Management Capacity and RCRA Consistency Issues (Dec. 23, 1988) (Pet. App. 123a-124a).

requirement that state programs be consistent throughout the nation is that Congress did not intend for the States selectively to discriminate against each other or to isolate themselves from interstate commerce in hazardous wastes. This interpretation is reflected in EPA's determination that "[a]ny aspect of the State program which unreasonably restricts, impedes, or operates as a ban" on interstate commerce of hazardous wastes is inconsistent with the integrated national program Congress intended. 45 Fed. Reg. 33,465 (1980); 40 C.F.R. 271.4(a). EPA's "consistency" determinations are, of course, directed to questions arising under the statutes it administers; the agency does not purport to adjudicate constitutional questions under the dormant Commerce Clause. Nor has Congress directed it to do so.

Moreover, RCRA expressly contemplates that States will enter into compacts for "cooperative effort and mutual assistance for the management of * * * hazardous waste." 42 U.S.C. 6904(b)(1). This cooperation is the antithesis of discrimination, protectionism, or retaliatory barriers to the interstate shipment of hazardous wastes. At the very least, "the fact that Congress has been willing to let the States settle their differences over [hazardous wastes] through mutual agreement [does not] constitute[] persuasive evidence that Congress consented to the unilateral imposition of unreasonable burdens on commerce." *Sporhase*, 458 U.S. at 960 (quoting *New England Power Co.* v. *New Hampshire*, 455 U.S. 331, 343 (1982)).[9]

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[9] Indeed, if Congress had intended to authorize such discrimination against interstate commerce in hazardous wastes, or to allow EPA to validate discriminatory programs, it could have said so explicitly. In the Low-Level Radioactive Waste Policy Act, 42 U.S.C. 2021b-2021j, for example, Congress expressly authorized States that enter into compacts for the operation of regional radioactive waste disposal facilities to ban

RCRA differs markedly from programs that this Court has found to reflect a congressional intent to authorize state or local action that otherwise would violate the Commerce Clause. In *White* v. *Massachusetts Council of Construction Employers, Inc.*, 460 U.S. 204, 213 (1983), the Court upheld a municipal order reserving jobs for city residents in a community development program where the federal program regulations "affirmatively permit[ted] the type of parochial favoritism expressed in the order." In *Merrion* v. *Jicarilla Apache Tribe*, 455 U.S. 130, 150 & n.21 (1982), the Court concluded that Congress had "convincingly" "articulate[d]" its intention that certain taxes imposed by Indian tribes on nonmembers "do not threaten its latent power to regulate interstate commerce." And in *Northeast Bancorp, Inc.* v. *Board of Governors of the Federal Reserve System*, 472 U.S. 159, 172 (1985), the Court found "no other conclusion but that Congress contemplated that some States might partially lift the ban on interstate banking without opening themselves up to interstate banking from everywhere in the Nation." RCRA, by contrast, provides no indication whatsoever that Congress intended either directly to authorize States to discriminate against interstate commerce or to authorize EPA to validate discriminatory state programs.

ii. Petitioners err in relying, Pet. 18-19, on CERCLA's capacity assurance provision, Section 104(c)(9). Contrary to petitioners' contention, the CAP provision does not "direct" States to enter into interstate or regional agreements; it is merely a

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radioactive waste shipments from States that fail either to enter into a regional compact or to meet federal deadlines for establishing their own facilities. 42 U.S.C. 2021e(e)(2) and (f)(1). Under RCRA, the only consequence of a State's failure to submit a "consistent" plan is that the State must abide by the federal plan.

planning provision that recognizes that a State may assure adequate hazardous waste capacity based *either* on facilities within its own borders *or* on available facilities in other States pursuant to an interstate or regional agreement or authority. 42 U.S.C. 9604(c)(9)(B). In any event, if a State wishes to guarantee access to private hazardous waste facilities as part of an interstate or regional agreement, it can do so through nondiscriminatory means, such as contracting with private facilities. Far from evincing an "unmistakably clear" intent to authorize discrimination against out-of-state waste, Section 104(c)(9) reflects Congress's goal of encouraging interstate cooperation and discouraging the balkanization of a national problem. See *National Solid Wastes Management Ass'n* v. *Alabama Dep't of Envt'l Management*, 910 F.2d 713, 721-722 (1990), as modified upon denial of reh'g, 924 F.2d 1001 (11th Cir.) (the capacity assurance provision does not authorize discrimination against interstate commerce), cert. denied, 501 U.S. 1206 (1991).

2. Nor is review warranted of the lower courts' refusal to sever and uphold two allegedly "neutral" aspects of these provisions. One is the provision in Act No. 590 that reduces the annual statewide cap on land disposal of hazardous waste to 120,000 tons for the 12 months ending July 1, 1991, and to 110,000 tons for each 12 months thereafter. See Pet. App. 131a-132a. Although this cap, standing alone, does not differentiate between out-of-state and in-state waste, it does not stand alone. It is accompanied by a provision for exceeding those limits based on volumes of in-state, but not out-of-state, wastes. See Act No. 590, § 2 (allowing cap to be exceeded if at least 110,000 tons of hazardous wastes from *in-state* generators were buried during the previous year) (Pet. App. 131a-132a). The court of appeals' refusal to assess this one aspect of Act No. 590 in isolation is consistent with this

Court's precedents. See, *e.g.*, *West Lynn Creamery, Inc.* v. *Healy*, 512 U.S. 186 (1994). The court independently ruled that the provision was not severable under South Carolina law, Pet. App. 24a n.21, and that state law determination does not warrant this Court's review. Of course, nothing in the court of appeals' opinion prohibits South Carolina from reenacting the statewide disposal cap without discriminatory provisions for exceeding it.

The court of appeals invalidated South Carolina's "needs regulation" (DHEC Reg. 61-99) because it defines "need" in a manner that clearly favors in-state generators at the expense of out-of-state generators. Pet. App. 24a-26a. That holding is based on a straightforward application of this Court's dormant Commerce Clause jurisprudence, see, *e.g.*, *Oregon Waste Sys.*, 511 U.S. at 99 ("differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter" are "virtually *per se* invalid"), and therefore does not merit further review.

3. Finally, petitioners err in contending, Pet. 28-30, that the case should have been referred to EPA under the "primary jurisdiction" doctrine. That doctrine provides federal courts with a discretionary tool "designed to coordinate administrative and judicial decisionmaking by taking advantage of agency expertise." Pet. App. 26a (citing *United States* v. *Western Pac. R.R.*, 352 U.S. 59 (1956)). The district court found no unresolved issues of fact and declined to refer to EPA questions of constitutional law, which are appropriate for resolution by an Article III court and are not a matter of agency expertise. *Id.* at 29a. The court's ruling was particularly appropriate in this case because EPA already had submitted an *amicus* brief expressing its views on both legal and factual issues. Accordingly, the court of appeals

correctly concluded that the district court did not abuse its discretion[10] in denying petitioners' motion.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[10] Contrary to petitioners' contention, Pet. 29-30, courts of appeals have consistently applied an abuse-of-discretion standard to such determinations. See, *e.g.*, *In re Lower Lake Erie Iron Ore Antitrust Litig.*, 998 F.2d 1144, 1162 (3d Cir. 1993), cert. denied, 510 U.S. 1091 (1994). Nor would a more stringent standard of review warrant a different result on this point.